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No. 99-

IN THE

Supreme Court of the United States

TOM CAMPBELL,
Member, U.S. House of Representatives, *et al.*,

Petitioners,

v.

WILLIAM JEFFERSON CLINTON,
President of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Members of Congress Can Ever Have Standing to Challenge Executive Nullification of Their Votes.

2. Whether the War Powers Resolution Limitation of Executive Authority to Engage U.S. Armed Forces in Hostilities Without Congressional Approval For More Than 60 Days is Constitutional.

3. Whether the President Can Constitutionally Initiate a Substantial and Sustained Military Operation Using U.S. Troops Against a Foreign Country Without First Obtaining the Authorization of Congress.

4. Whether the Prior Two Questions Raise Non-Justiciable Political Questions.

5. Whether the Dispute Presented Here is Capable of Repetition Yet Will Typically Evade Review.

PARTIES TO THE PROCEEDING

Petitioners are 31 Members of the U.S. House of Representatives, both Republicans and Democrats:

Congressman Tom Campbell
Congressman Dennis Kucinich
Congressman Richard Baker
Congressman Bob Barr
Congressman Roscoe Bartlett
Congressman Dan Burton
Congressman Chris Cannon
Congressman John Cooksey
Congressman Phillip Crane
Congresswoman Pat Danner
Congressman John Doolittle
Congressman John Duncan
Congressman Terry Everett
Congressman Greg Ganske
Congressman Rick Hill
Congressman Van Hilleary
Congressman Walter Jones
Congresswoman Marcy Kaptur
Congressman Donald Manzullo
Congressman Jack Metcalf
Congressman Charlie Norwood
Congressman Ron Paul
Congressman Tom Petri
Congressman Dana Rohrabacher
Congressman Marshall Sanford
Congressman Joe Scarborough
Congressman Bob Schaffer
Congressman James Sensenbrenner

Congressman Pete Stark
Congressman Thomas Tancredo
Congressman Curt Weldon

Respondent is the President of the United States, William Jefferson Clinton.

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Congressman Tom Campbell and 30 petitioners, who are also Members of the U.S. House of Representatives and parties to the action below, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The District of Columbia Circuit of the Court of Appeals affirmed the judgment of the United States District Court for the District of Columbia granting defendant's motion to dismiss. The District of Columbia Circuit's opinion (App. A) is reported at *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). The district court opinion (App. B) is reported at *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999).

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

The opinion of the court of appeals from which petitioners seek review was filed on February 18, 2000. This petition for a writ of certiorari is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Article I, Section 8, Clause 11, the War Power Clause of the United States Constitution, is set forth in the Appendix. The text of the War Powers Resolution, 50 U.S.C. § 1541, *et seq.*, is set forth in the Appendix.

STATEMENT OF THE CASE

A. The U.S. Military Action Against Yugoslavia

The facts of this case are undisputed. On March 24, 1999, President Clinton announced that U.S. Armed Forces, along with military forces from the North Atlantic Treaty Organization nations (hereinafter "NATO"), had begun air strikes against Serbian military targets in the former Yugoslavia.[1] On March 26, the President submitted a report to the Speaker of the House of Representatives and the President pro tempore of the Senate stating that ". . . on March 24 U.S. military forces . . . began a series of air strikes in the Federal Republic of Yugoslavia."[2]

Thereafter, NATO engaged in daily air operations against Serb targets in Kosovo and Serbia, involving more than 800 U.S. airplanes flying more than 20,000 sorties and causing thousands of enemy casualties.[3] On April 5, 1999, Secretary of Defense William Cohen told the Senate Armed Services Committee Hearing on Kosovo that: "We're certainly engaged in hostilities, we're engaged in combat."[4]

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1. President's Remarks Announcing Airstrikes, 35 Weekly Comp. Pres. Doc. 513 (March 24, 1999).

2. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 Weekly Comp. Pres. Doc. 528 (March 26, 1999).

3. *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring).

4. Hearing on Kosovo, Senate Armed Services Comm., 106th Cong., April 5, 1999, 1999 WL 221637 (testimony of William Cohen, Secretary of Defense).

As of May 25, the United States Armed Forces had been engaged in hostilities for 60 days after President Clinton submitted his March 26 report. The War Powers Resolution requires that the President withdraw United States Armed Forces from hostilities within 60 days after the filing of the report unless Congress has declared war or specifically authorized such use of United States Armed Forces. 50 U.S.C. § 1544(b). The House of Representatives had on April 28th defeated a declaration of war and by a tie vote of 213 to 213 defeated the specific authorization required by the Resolution. Nonetheless, the President continued those hostilities until June 10, when the United States and its NATO allies suspended the air attacks against Yugoslavia after the Yugoslav government agreed to withdraw its armed forces from Kosovo. On June 20, NATO and the United States officially terminated the air war against Yugoslavia.

B. Congressional Action

Congress acted upon several pieces of legislation in connection with the Kosovo conflict. Pursuant to the priority procedures of the War Powers Resolution, 50 U.S.C. §§ 1545-46, the House of Representatives expedited consideration of resolutions to declare war, H.J. Res. 44, and to withdraw troops, H. Con. Res. 82. The Senate passed a resolution authorizing the President to conduct military air operations and missile strikes in cooperation with NATO against the Federal Republic of Yugoslavia on March 23, 1999, but the House of Representatives rejected that authorization by a 213-213 tie vote on April 28, 1999.[5] On April 28, the House also defeated a measure declaring a state of war between the United States and the Federal Republic of Yugoslavia,[6] and a measure directing the President to remove U.S. Armed

5. S. Con. Res. 21, 106th Cong. (1999).

6. H.J. Res. 44, 106th Cong. (1999).

Forces from operations against the Federal Republic of Yugoslavia.[7] Both Houses of Congress also subsequently agreed to an emergency supplemental appropriation.[8]

C. Decisions Below

Petitioners filed this action seeking a declaration that President Clinton violated the War Powers Clause of the Constitution and the War Powers Resolution, 50 U.S.C. § 1541, *et seq.* by engaging United States Armed Forces in an offensive military attack against the Federal Republic of Yugoslavia without obtaining a declaration of war or other explicit authorization from Congress. Federal jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1361, 1651, 2201-2202.

The District Court ruled that petitioners did not have standing to maintain this action. The Court recognized that the question this case presented was whether petitioners' votes in refusing to authorize the U.S. military action against Yugoslavia had been "nullified" by the President as that term was used in *Coleman v. Miller*, 307 U.S. 433 (1939) and *Raines v. Byrd*, 521 U.S. 811 (1997). District Judge Paul L. Friedman held that "the circumstances of this case obviously are more similar to those of *Coleman* than were the circumstances in *Raines*." 52 F. Supp. 2d 34 at 42. Nevertheless, the Court denied petitioners standing because it believed that Congress sent conflicting messages in its votes taken on April 28, 1999. While the House of Representatives on that day defeated the measures declaring war against the Federal Republic of Yugoslavia and providing the President with authorization to conduct air strikes, it also

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7. H. Con. Res. 82, 106th Cong. (1999).

8. 1999 Emergency Supplemental Appropriation Act, Pub. Law. 106-31, 113 Stat. 57.

defeated a resolution that would have directed the President to remove United States Armed Forces from their positions in connection with the present operation against the Federal Republic of Yugoslavia. The Court recognized that neither the defeat of the resolution to remove the troops, nor the subsequent passage of a supplemental appropriations bill constituted authorization within the meaning of the War Powers Resolution, but held that the congressional action on those measures defeated petitioners' legislative standing.[9]

The Court of Appeals affirmed the district court. No Circuit Judge, however, adopted the district court's reasoning. The majority denied petitioners' standing based primarily on its conclusion that members of Congress "continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the 'war.' " 203 F.3d 19 at 23. The majority believed that this Court viewed *Coleman* as "an unusual situation" in which the Kansas Senate was completely powerless to do anything to reverse the governor's action in deeming the constitutional amendment ratified. *Id.* at 22. Where Congress has political remedies available to it to remedy a President's nullification of legislators' votes, the majority would deny legislative standing. It read this Court's response to members of Congress who sought standing in *Raines* to be "if at first you don't succeed, try and try again"; *id.* at 24, meaning that if a vote denying the President authority is treated as a nullity, then Congress can "try again" and cut off funds, and if that fails then Congress can "try again" and impeach the President.[10] Since Congress can

9. 52 F. Supp. at 43-44. Petitioners believe that the District Court erred in applying these various votes to its standing analysis. While those votes may have been relevant in determining the nature of the relief a court should order, they do not diminish the discrete injury caused by the President's actions nullifying petitioners' votes.

10. This is exactly the requirement Congress rejected by enacting the War Powers Resolution.

always cut off funds for a war or impeach a President who disregards congressional authority, the court concluded that members of Congress have no standing to challenge alleged violations of the War Powers Resolution or the War Powers Clause of the Constitution.

Judge Randolph concurred in the decision, but disagreed with the majority's analysis of standing. He argued that "the majority's decision is tantamount to a decision abolishing legislative standing." *Id.* at 32. That is because "as long as Congress and the Constitution exist, Members will always be able to vote for legislation."[11] *Id.* Judge Randolph believed that the majority had "confused the right to vote in the future with the nullification of a vote in the past, a distinction *Raines* clearly made." *Id.*

Judge Randolph viewed the majority's decision as conflicting with the Court's decision in *Raines*, arguing that: "if we are going to get rid of legislative standing altogether, we ought to do so openly and not under the cover of an interpretation, or rather misinterpretation, of a phrase in *Raines*." *Id.* Judge Randolph also believed that the majority's opinion conflicted with the Circuit's recent decision in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).[12]

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11. Similarly District Court Judge Friedman also rejected the President's argument that was adopted by the Court of Appeals majority: "The mere *availability* of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President." 52 F. Supp. at 45 n.11 (emphasis in original).

12. Judge Randolph viewed *Chenoweth* as concluding that the pocket veto case, *Kennedy v. Sampson*, 511 F.2d 430 (1974), was "still good law." *Id.* at 32. But since Congress could always respond to a pocket veto by passing the law again, or impeaching the President, Randolph argued that *Chenoweth* and the majority opinion were in conflict.

Judge Randolph held that the petitioners had no standing to assert their constitutional claim because their vote against declaring war did in fact deprive the President of powers he would have under various statutes in time of declared war, and therefore was not "completely nullified." He did not, however, decide whether petitioners had standing to assert their War Powers Resolution claim. He held that claim, as well as the constitutional claim, to be moot. Judge Randolph concluded that petitioners had not met "the evading review yet capable of repetition exception" to mootness because: (a) Executive initiated military action is not inherently so short in duration as to avoid review; and (b) such military actions are likely to be over in less than 60 days, so that petitioners' War Powers Resolution claims did not meet the capable of repetition prong of the test.

Judge Silberman and Judge Tatel also wrote separate concurring decisions in which they disagreed over whether the substantive issues involved in this case could ever be justiciable. Judge Silberman argued that petitioners' claims were not justiciable because of the lack of judicially discoverable and manageable standards for addressing them, and because the War Powers Clause claim implicates the political question doctrine. Judge Tatel disagreed, arguing that the judiciary was fully capable of making the determination of what constitutes "war" for purposes of the War Powers Clause, and what constitutes hostilities under the War Powers Resolution. Indeed, Judge Tatel wrote that the "undisputed facts of this case" are "compelling with respect" to both the War Powers Resolution and the "plaintiffs' constitutional claim." 203 F.3d at 40.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION IS IN CONFLICT WITH *RAINES v. BYRD* AND WITH THE CIRCUIT'S DECISION IN *CHENOWETH v. CLINTON* AND RAISES IMPORTANT QUESTIONS OF WHETHER MEMBERS OF CONGRESS EVER HAVE STANDING TO ASSERT INSTITUTIONAL INJURIES

The Court of Appeals majority held that members of Congress do not have standing to challenge a President's nullification of a congressional vote when those legislators have political remedies available to them. Judge Randolph's concurrence correctly observed that this holding is "tantamount to a decision abolishing legislative standing" and was in conflict with this Court's decision in *Raines v. Byrd*.

Congress enacted the War Powers Resolution in 1973, over President Nixon's veto, in order to enforce its assertion of constitutional authority that U.S. Armed Forces be committed to (or maintained in) hostilities only with the approval of Congress. The critical legal mechanism chosen by Congress to enforce its constitutional powers was the provision of the War Powers Resolution requiring the President to withdraw United States armed forces from hostilities within 60 days of filing the report required by the statute, unless Congress *affirmatively* authorized the use of such forces.[13] 50 U.S.C. § 1544(b). In this case, Congress

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13. President Nixon cited this as one of the bases for his veto of the resolution. "One of its provisions would automatically cut off certain [claimed presidential] authorities after sixty days." The President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval. October 24, 1973; appended to Judge Randolph's concurring opinion in *Campbell v. Clinton*, at 35.

not only never provided authority, but explicitly voted to deny the affirmative authority mandated by the War Powers Resolution. Yet the President continued the war beyond the statutory cut off.

On April 28, 1999, the House of Representatives, acting pursuant to the priority procedures set forth in the War Powers Resolution, voted 427 to 2 against declaring war, and by 213 to 213 against authorizing the President to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia. 203 F.3d at 20. Those votes were sufficient to defeat the legislative enactment of authorization which the Constitution and War Powers Resolution required for the President to continue the war against Yugoslavia.

Where Congress: (a) enacts a statute defining the boundary between Congress' and the Executive's constitutional authority; (b) sets forth a specific procedure to enforce its constitutional authority that requires Congress' affirmative consent to continue hostilities; and (c) subsequently employs that procedure to defeat the specific statutory authorization required; those legislators who successfully voted down a declaration of war (H.J. Res. 44) and the statutory authorization to allow the air war to continue (S. Con. Res. 21) suffer a concrete and particularized injury sufficient to maintain standing to sue when the Executive nonetheless ignores their action. That is the import of this Court's decision in *Coleman v. Miller*, 307 U.S. 433 (1939), which the Court distinguished and did not overrule in *Raines v. Byrd*, 521 U.S. 811, 823-824 (1997). *Coleman* stands [at most] for the "proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their

votes have been completely nullified." 521 U.S. at 823.[14] That is precisely what occurred in the instant case.

In *Raines*, this Court was unwilling to recognize an institutional injury sufficient to confer standing suffered by legislators whose votes had been given "full effect" in the legislative process but had "simply lost" the vote. *Id.* at 824. In that case, the plaintiffs injury was really caused by the actions of their own colleagues, and not by the President as is the case here. *Raines*, at 829-830 n.11. Here, by contrast, petitioners won the relevant congressional votes taken pursuant to the War Powers Resolution's procedures and the Constitution on whether to authorize or declare war against Yugoslavia. Moreover, petitioners do not complain merely that the President has failed to comply with the relevant law, in this case the War Powers Resolution. Rather, they claim that the President treated a specific vote that each of them took pursuant to the War Powers Resolution as a legal nullity, as having no legal effect, despite their having prevailed in the legislative process. This is the opposite of the position of the plaintiffs in *Raines*. In the language used by this Court in *Raines*, the President "completely nullified" their votes.

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14. The *Raines* court also cited *Bender v. Williamsport Area School*, 475 U.S. 534, 544-545 n.7 (1986), to support the *Coleman* proposition. *Id.* at 823 n.6. In *Bender* the court hypothesized that a school board member would have standing to sue if state law authorized a school board to take action only by unanimous consent, if a school board member voted against a particular action, and if the board nonetheless took the action. *Id.* That hypothetical is analogous to this case: the Constitution and War Powers Resolution require legislative authorization for war, and the legislators whose votes were sufficient to defeat such authorization sue because the President has nonetheless continued the war, thus completely nullifying their vote. Petitioners therefore have standing to sue on both their constitutional and War Powers Resolution claims.

The Court of Appeals majority nonetheless held that petitioners did not have standing under the *Coleman* exception articulated in *Raines* because "they continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the 'war.' " The majority acknowledged that it was "not readily apparent what the Supreme Court meant" by the word nullified. 203 F.3d at 22. It held that legislators' votes are not completely nullified where Congress has political remedies — such as cutting off funding for a war or impeaching the President — available to it to remedy a President's nullification of a congressional vote. The majority erroneously read *Raines* as telling members of Congress, "if at first you don't succeed, try and try again"; meaning that if a vote denying the President authority to wage war is treated as a nullity, then Congress can "try again" and cut off funds, and if that fails then Congress can "try again" and impeach the President. This is to confuse possibility with requirement and to turn the *Raines* test on its head. If *Raines* stands for the proposition that having failed in the legislative arena, a legislator must turn to that arena for relief, the corollary must be that if one has prevailed, the courts must vindicate the validity of the members' votes, as the Court did in *Coleman* and refused to overrule in *Raines*.

Judge Randolph correctly viewed the majority's decision as conflicting with this Court's decision in *Raines*. *Raines* explicitly left open the possibility of a narrow *Coleman* exception where Congress defeats a specific legislative action which the President nullifies, an exception the circuit court now closes. Judge Randolph argued that "the majority's decision is tantamount to a decision abolishing legislative standing," an outcome also articulated by District Judge Friedman.[15] 203 F.3d at 32. That is because "as long as

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15. "The mere *availability* of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President." 52 F. Supp. at 45.

Congress and the Constitution exist, Members will always be able to vote for legislation." *Id.* Judge Randolph believed that the majority had "confused the right to vote in the future with the nullification of a vote in the past, a distinction *Raines* clearly made." *Id.*

Judge Randolph also accurately viewed the majority's opinion as conflicting with the Circuit's recent decision in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). That is because the *Chenoweth* Court clearly treated the pocket veto case, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), as consistent with the narrow *Coleman* exception left open in *Raines*. But since Congress could always respond to a pocket veto by passing the law again, or impeaching the President, Randolph argued that *Chenoweth* and the majority were in conflict.

This Court should resolve the conflict between the majority below and this Court's opinion in *Raines v. Byrd* and the Circuit's decision in *Chenoweth v. Clinton*. The issue of whether members of Congress ever have standing to assert institutional injuries is an important issue explicitly left unresolved by this Court in *Raines*. Petitioners in this case fall within the *Coleman* exception articulated by this Court in *Raines*,[16] and this case, therefore, requires this Court to

16. While the majority relied centrally on its view that nullification could not occur where the legislators had political remedies available, it also held that this case was different from *Coleman* because "the President here did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization, but instead 'pursuant to [his] constitutional authority'. . ." *Id.* at 22. This distinction is illogical, since it accords significance to the reasons the Executive provides for nullifying a congressional vote, and not the fact of that nullification. There can be no argument that the President treated the April 28 tie vote as a legal nullity. It ought to make no difference whether he stated that

(Cont'd)

decide whether that exception applies to injured federal legislators in a context where a private party is unlikely to sue. The majority's determination that the *Coleman* exception does not apply whenever legislators have potential political remedies to rectify an executive nullification contradicts this Court's rationale in *Raines v. Byrd* and should be reviewed.

II.

THE MERITS OF THIS CASE RAISE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW THAT THIS COURT OUGHT TO DECIDE NOW

At the core of this case are two purely legal questions of the Constitution's allocation of power between the political branches that can only be resolved by this Court. The first is whether the War Powers Resolution limitation of Executive authority to deploy U.S. troops in combat without congressional approval for more than 60 days is constitutional. The second is whether the President can initiate a substantial and sustained military operation using U.S. troops against a foreign country without first obtaining the authorization of Congress.

In the wake of the constitutional and political trauma caused by the Vietnam War, Congress enacted the War Powers Resolution over a Presidential veto in order to "reaffirm the

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(Cont'd)
he believed a tie vote constituted authorization or whether he stated that he believed he had the constitutional authority to wage war despite Congress' vote. Indeed, legislative standing is more compelling in the later case than the former, for the Court is asked to resolve a constitutional confrontation and not merely a question about the significance of a tie vote. The *Coleman* legislators should still have had standing had the governor in that case asserted that he was acting under his constitutional authority to ratify amendments on his own, despite the legislators' tie vote. The weakness of this attempted distinction of *Coleman* led the majority to rely on the availability of political remedies to distinguish this case and *Coleman*.

constitutional given authority of Congress to declare war." House Report No. 93-287, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2346. Nevertheless every President since President Nixon has refused to comply with the War Powers Resolution's strictures,[17] and this Court and lower federal courts have declined to adjudicate various challenges to Executive action allegedly violating the statute.[18]

Persistent Executive disregard of a statute enacted by Congress to give effect to the Constitution's allocation of governmental authority strikes at the heart of a constitutional democracy. The Executive's refusal to follow the law undermines the rule of law. While our Constitution recognizes and accepts the inevitable friction produced by its separation of powers, persistent executive law breaking cannot be a healthy by-product of separation of powers. Nor is it desirable for constitutional law or United States foreign policy to continue the pattern of Executive military action abroad followed inevitably by congressional claims of constitutional usurpation and statutory violation.[19]

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17. President Nixon believed the War Powers Resolution to be unconstitutional and vetoed the bill, a veto that Congress overrode. Subsequent presidents have filed reports of military action "taking note" of the War Powers Resolution or "consistent with" the Resolution, but never pursuant to the Resolution. See reports reprinted in Foreign Relations and National Security Law 591-598 (Thomas M. Franck & Michael J. Glennon eds., 2d ed. 1993).

18. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, *aff'd*, 770 F.2d 202 (D.C. Cir. 1985); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. 1988); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

19. The solution to this problem is not impeachment, particularly where the alleged violation is not the result of specific Executive misconduct, but rather arises from a serious and sustained dispute between the branches over their respective constitutional powers.

This lengthy and persistent struggle between the branches over the constitutionality of the War Powers Resolution has proven impervious to political resolution, in somewhat the same manner as the constitutional controversies over the President's power to remove Executive officials and the legislative veto could not be resolved politically. Judicial resolution of the issue is the only method to resolve this intractable dispute between the political branches over their respective constitutional authorities before it erupts again in the context of another constitutional crisis of the order presented by the Vietnam War. Judicial resolution could prevent the inevitable repetition of the traumatic constitutional experience the country and the government experienced during that war[20] — an experience from which the Congress sought to protect the Nation by enacting the War Powers Resolution. The cost of judicial abstention now is likely to be paid by future generations.

The determination of whether a statute is constitutional is quintessentially for the judiciary to make and ought not be left to the political branches. As this Court stated in *INS v. Chadha*, no policy underlying judicial abstention "suggests that Congress or the Executive, or both acting in concert and in compliance with Article I, can decide the constitutionality of a statute; that is a decision for the courts." 462 U.S. 919, 942 (1983). That the issue involves war powers does not warrant complete judicial abstention, for as then Assistant Attorney General William Rehnquist pointed out 30 years ago, the constitutional allocation of power in this area "has been left to nearly two hundred years of interpretation by *each of the three* coordinate branches of

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20. This Court refused to grapple with the constitutional implications of the Vietnam War, a refusal that Justice Stewart believed constituted the court's greatest single failure during his tenure as a justice. Laurence H. Tribe, *Justice Stewart: A Tale of Two Portraits*, 95 Yale L.J. 1328, 1331 (1986).

the National Government . . ."[21] (Emphasis added.) Thus, throughout the 19th century, this Court and lower federal courts decided issues of the proper boundary between Executive and congressional powers over initiating and continuing warfare. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black 635 (1863)). This Court has attempted to define more precisely the constitutional limits of the co-ordinate branches' powers set by federalism after many years of deferring to the political process, *United States v. Lopez*, 514 U.S. 549 (1995); it is equally important that the Court decide what limits exist to Executive and congressional power imposed by the Constitution's separation of powers clauses pertaining to war.

In enacting the War Powers Resolution, Congress attempted to clarify the line between Executive and congressional authority. This case provides this Court with the best possible case to undertake its role as one of the coordinate branches to determine whether the line Congress has drawn is constitutional. At some point, at some time, in some case, this Court must decide that question: as the Court noted in *Myers v. United States* it will "be *inevitably* presented." 272 U.S. 52, 173 (1927).

Congressional leaders and Executive officials have in the past explored mechanisms to obtain judicial resolution of the persistent and protracted constitutional conflict over the War Powers Resolution,[22] only to be stymied by the difficulty of

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21. Statement by William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, On the President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries, quoted in Report of the Senate Foreign Relations Committee on the War Powers Act, S. Rep. No. 220, 93rd Cong., 1st Sess. (1973) at p. 9.

22. *See* Departments of Commerce, Justice and State, The Judiciary Related Agencies Appropriations for Fiscal Year 1985 Before Subcomm. of the Committee of Appropriations, 98th Cong., 2d Sess. 708-710 (1984) (colloquy between Senator Specter and (Cont'd)

obtaining such review in a context that did not challenge a specific military operation. This case presents a concrete case and controversy for review by this Court in a context particularly suited for a decision by this Court. Four reasons make this case uniquely appropriate for judicial review.

First, this case starkly and clearly presents the question of whether the War Powers Resolution's 60 day limitation on the President's authority to use troops in combat without obtaining congressional assent is constitutional. This case is shorn of the factual thickets and legal ambiguities that have made courts reluctant to intervene in prior congressional tests of the War Powers Resolution. *Compare Crockett v. Reagan*, *supra*; *Sanchez-Espinoza v. Reagan*, *supra*; *Lowry v. Reagan*, *supra*. The facts here are uncontested. The United States and NATO air war against Yugoslavia that commenced on March 24, 1999, constituted "hostilities" under any conceivable definition of the word in Section 4(a) of the War Powers Resolution. Executive officials such as the Secretary of Defense stated that the United States Armed Forces were engaged in hostilities against Yugoslavia. Under Section 5(b) of the Resolution, President Clinton could not continue those hostilities for more than 60 days without explicit congressional approval. There can be no dispute that the House of Representatives failed to approve such explicit authorization as defined and required by the statute. Thus, the President's only possible defense to the merits of this

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(Cont'd)
Secretary of State George P. Shultz on discussions between Senate leadership and some top officials at the White House about a test case which would go to the Supreme Court on constitutionality of War Powers Resolution). *See also* Bernard Gwertzman, *War Powers Test By Supreme Court Weighed in Senate*, N.Y. TIMES, Mar. 29, 1984, at A1; Sara Fritz, *Pressure Grows for Overhaul of War Powers Act*, L.A. TIMES, Oct. 26, 1987, at 1 (Senate Minority Leader Bob Dole seeks Supreme Court test of the constitutionality of War Powers Resolution).

action is that Section 5(b) of the War Powers Resolution is an unconstitutional infringement on Executive authority. That purely legal question is for this Court and not the political branches to decide.[23]

Second, unlike prior cases in which Congress remained silent in the face of an alleged violation of the War Powers Resolution and Constitution, here Congress did affirmatively invoke the War Powers Resolution and denied the President authority required by that Act to continue the Yugoslav war. *Compare Crockett v. Reagan*, *supra*, *Lowry v. Reagan*, *supra*. The teachings of this Court's decision in *Raines v. Byrd*, as well as Justice Powell's decision in *Goldwater v. Carter*, 444 U.S. 997 (1979) (Powell, J., concurring) are that the courts should not decide claims brought by members of Congress unless and until Congress itself takes action that the Executive treats as a legal nullity. *See also Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). In the present case, members of Congress invoked the War Powers Resolution and took a series of votes pursuant to that statute. For purposes of Section 5(b) of the War Powers Resolution, the relevant votes Congress took were to defeat resolutions to authorize the air war against Yugoslavia and to declare war against Yugoslavia. Congress therefore acted and the President disregarded that action. Petitioners won the relevant votes in the political process, yet their votes were nonetheless ignored by the President. This Court therefore ought to decide whether Congress' action had the legal significance that petitioners assert, or whether the President was constitutionally free to nullify those votes and disregard the statutory and constitutional framework pursuant to which they were undertaken.

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23. Similarly, petitioners' constitutional Article I, § 8 claim presents a clear, defined legal issue.

Third, petitioners here are the most appropriate parties to test this issue in court. For Justices Souter and Ginsburg, the "*certainty*" of a private party being able to bring suit was a "good reason to resolve doubts about standing against the plaintiff invoking an official interest." *Raines v. Byrd*, 512 U.S. 811, 835 (Souter & Ginsburg, J.J., concurring) (emphasis added). Here, by contrast, there are powerful disincentives for members of the armed forces to bring such a lawsuit: career officers would risk sacrificing their careers, while enlisted personnel would be challenging authority in ways that are fundamentally inconsistent with the values and ethos instilled by military training and discipline.[24] John Hart Ely, *War & Responsibility* 56-57 (1993). It is thus no accident that virtually all of the challenges to executive action under the War Powers Resolution have been brought by members of Congress, not by private parties.[25] While it is possible that a member of the armed services might bring such an action in the future, it is neither likely nor certain. Moreover, this Court's standing doctrine ought not create a condition that invites disruption within the military. The most appropriate party to test the constitutionality of the War Powers Resolution claim that the President has exceeded his or her authority in the face of congressional action that statutorily requires the President to cease military operations is therefore a member of Congress who votes successfully against authorizing a specific military action, and not soldiers who must sue their Commander-in-Chief as they are ordered into battle.

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24. As a practical matter, service personnel who might challenge an illegal presidential war will be given the excruciating choice of following what they believe to be an illegal order, perhaps for months or years, or defying the order and facing court-martial, in an effort to press their claim with the courts. Failure by either count can lead to serious retribution or to imprisonment, facts which will continue to deter private lawsuits by service members.

25. *Crockett v. Reagan, supra*; *Sanchez-Espinoza v. Reagan, supra*; *Lowry v. Reagan, supra*; *Campbell v. Clinton.* The one exception is *Ange v. Bush, supra.*

Finally, this is the ideal time to litigate this issue. The hostilities against Yugoslavia have ended, although the Executive practice that petitioners' challenge is likely to continue. For this Court to decide the constitutionality of the War Powers Resolution in the context of an ongoing military crisis in which a soldier sues his or her Commander-in-Chief, or Congress challenges the President, would be, as then Judge Ginsburg noted, "hardly a prime time for dispassionate adjudication." *Doe v. Sullivan*, 938 F.2d 1370, 1379 (D.C. Cir. 1991). *See also* William H. Rehnquist, *All the Laws But One* 221 (1998) (noting "the reluctance of courts to decide a case against the government on an issue of national security during war"). As the Court noted in *Doe*, the kind of issues raised here can be considered "most calmly and effectively after the battle fire is extinguished and before it is rekindled." *Id.*[26]

Moreover, this case is ripe for resolution in another sense. This Court has given the political branches over a quarter century to resolve the constitutional dispute that divides them. It may have been appropriate for the Court to avoid deciding the constitutionality of the War Powers Resolution fairly soon after its enactment, so that Congress and the President could resolve the constitutional dispute politically as the statute's operational contours became clearer. That political resolution has not happened, and is unlikely to occur given the entrenched institutional positions of each branch. Now is the time for this Court to act. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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26. Indeed, this is analogous to the Congress' requirement in the War Powers Resolution of a specific authorization, and a statutory disclaimer concerning appropriations and other measures as sources of that authority. The Congress recognized what the courts have and what the Framers feared: Once the nation is unconstitutionally called to arms, it may feel compelled to persist despite the severity of the misgivings that would have prevented such a conflict in the first place had the constitutional order been preserved.

III.

THE COURT OF APPEALS CONCURRENCES RAISE IMPORTANT ISSUES OF CONSTITUTIONAL LAW AND CONFLICT WITH THE DECISIONS OF THIS AND PRIOR COURTS

1. Mootness

Judge Randolph decided that petitioners' claims were moot. All parties agree that the United States and its NATO allies officially terminated the air campaign against Yugoslavia on June 20, 1999. Petitioners claim, however, that this case is not moot because: (a) the dispute between the parties is "capable of repetition yet evading review"; and (b) petitioners challenge an ongoing policy and practice of the Executive Branch to initiate and continue offensive military actions against foreign states without obtaining congressional authorization.

Judge Randolph held that petitioners had not satisfied the capable of repetition yet evading review test. He believed that he was bound by *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985) to decide that offensive wars initiated without congressional approval are not "inherently" of short duration, and that therefore petitioners' claims will not evade review. He also doubted that the capable of repetition prong of the test was met with respect to petitioners' War Powers Resolution claims because "*most* military actions in the future . . . will be over before the 60-day limit" contained in the War Powers Resolution is reached. 203 F.3d at 34 (emphasis added). Those conclusions seem both mutually inconsistent and at odds with both this Court and the Circuit's precedent.

Judge Randolph, following Judge Tamm in *Conyers v. Reagan*, apparently believed that inherently of short duration means that the challenged activity has to be, by its very nature always short in duration, such as election campaigns or pregnancies. But the test articulated by this Court is whether the actions complained of are "*typically* of short duration." *Globe Newspaper Company v. Superior Court for the County of Norfolk*, 457 U.S. 596, 603 (1982) (emphasis added); *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) ("because such disputes typically are resolved quickly" it evades review); *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) ("because criminal proceedings are typically of short duration" the order will evade review). The Circuit has also held, subsequent to Judge Tamm's decision in *Conyers*, that the "possibility that the issue presented in this case will not always evade review" does not render a case moot where the issue typically or often will evade review. *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). *See also In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1329 (D.C. Cir. 1985) (issue evades review when "the interval of time that *typically* elapses" during the controversy is less than two years) (emphasis in original). *Doe v. Sullivan*, 938 F.2d 1370, 1376 n.10 (D.C. Cir. 1991) (*citing Washington Post*). *Hinckley v. United States*, 163 F.3d 647, 651 (D.C. Cir. 1999) (issue may evade review even when no assurance that time constraints will *always* preclude review) (emphasis in original).

In a variety of situations this Court and the Circuit have applied the "evading review" exception even though the action complained of could continue long enough to allow for full appellate review. Thus, the Circuit found that the time between the beginning of discovery and the completion of trial in a civil case "is hard to measure," and *typically* was less than two years, although it is common knowledge that

many civil cases take considerably longer to complete. *Reporters Committee*, *supra* at 1329. Similarly, the Circuit recognized that a criminal investigation "might continue for a much longer time" than a criminal proceeding but nonetheless held that it evaded review because it "may often" evade review. *Washington Post* at 287. This Court has applied the exception when an adolescent student, improperly disciplined, "*will often*" be finished with school by the time final appellate review would be available. *Honig v. Doe*, 484 U.S. 305, 322-23 (1988) (emphasis added). The Court has also found that economic strikes "are of comparatively short duration," although "[t]here are exceptions of course." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974). They evade review "[b]ecause *the great majority* of economic strikes do not last long enough for complete judicial review of the controversies they engendered." *Id.* (emphasis added).

More recently in *Spencer v. Kemna*, 523 U.S. 1 (1998), Justice Scalia perhaps created some confusion about the applicable test when he rejected the application of the capable of repetition yet evading review doctrine because petitioner had not shown "that the time between parole revocation and expiration of sentence is always so short as to evade review." 523 U.S. 1 at 18. Justice Scalia's one paragraph rejection of the capable of repetition exception did not purport to address the question of whether a challenged action must typically, or rather in every instance, be of short duration, and his use of the word "always" contradicts his own earlier reliance (as a Circuit Judge) on the more lenient standard of "typically" rather than always. *In re Reporters Committee*, 773 F.2d at 1329.[27] That is the important question this case raises.

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27. After *Spencer*, the Circuit had occasion to re-visit the "capable of repetition yet evading review" doctrine in *Hinckley*, and used a standard of whether cases of a certain duration "ordinarily evade review," and specifically rejected an "always" standard. 163 F.3d at 651.

Judge Randolph agreed that contemporary U.S. military actions are of relatively short duration and "most" are likely to be over in 60 days. That finding renders Judge Randolph's opinion that petitioners' claims do not evade review, at odds with this Court's decisions that would require merely that such military action typically end quickly. Judge Randolph's mootness analysis thus raises the important question of whether the "evading review" test requires the activity to "always" be so short as to evade review or to "typically" be of short duration. This Court should reaffirm its prior decisions.

Similarly, Judge Randolph's conclusion that petitioners' War Powers Resolution claims do not meet the capable of repetition prong of the test since "most" U.S. military actions are likely to be less than 60 days, runs afoul of this Court's mootness decisions. In *Honig v. Doe*, 484 U.S. 305, 318-19 n.6 (1988) the Court noted that the reasonable expectation requirement does not mean "demonstrably probable." The Court stated that the question was "whether the controversy was *capable* of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* (emphasis in original). *See also Doe v. Sullivan*, 938 F.2d 1370, 1378-79 (D.C. Cir. 1991) (question is whether "litigant 'faces some likelihood of becoming involved in the same controversy in the future' " (*citing United States Parole Commission v. Geraghty*, 445 U.S. 388, 400 (1980)). Here, there is clearly some likelihood that a President will again order U.S. troops into hostilities in the next decade without obtaining congressional approval, and that those hostilities will last for more than 60 days.[28] This Court should decide petitioners' claims.

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28. It is much less probable, however, that future hostilities involving U.S. Armed Forces would last more than the two years necessary to obtain full appellate review.

2. Political Question

Judges Silberman's and Tatel's concurrences with respect to the justiciability of the issues raised by this case reflect an ongoing division within the lower courts. Contrast *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990) with *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990). Judge Silberman's concurrence conflicts with the Second Circuit's position in *Orlando v. Laird*, 443 F.2d 1039, *cert. denied*, 440 U.S. 869 (1971) and *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970) which held that the issue of whether the President needed congressional authorization to wage the war in Vietnam was a justiciable question. It is also at odds with the D.C. Circuit's position in *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973) that saw no difficulty "in a court facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without congressional approval." This Court should resolve the disagreement between Judges Silberman and Tatel as to whether the issues presented in this case are justiciable.

Judge Silberman's position that the constitutionality of the War Powers Resolution can never be tested in Court is particularly disturbing. He argued that the question of whether the War Powers Resolution was triggered because United States forces were engaged in hostilities with Yugoslavia is a question unsuited to judicial resolution. That conclusion ignores the undisputed facts that American forces were clearly involved in hostilities with Yugoslavia and that Congress itself invoked the War Powers Resolution. Secretary of Defense Cohen recognized that "We're certainly engaged in hostilities, we're engaged in combat." 203 F.3d at 40. Judge Silberman's conclusion is contrary to the opinions of other courts that have considered War Powers Resolution claims and have noted that courts could decide a case in which

American forces were clearly engaged in hostilities and thus "the constitutionality of the War Powers Resolution" was "squarely presented." *Lowry v. Reagan*, 676 F. Supp. 333, 340-41 (D.D.C. 1987); *see also Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.D.C. 1983). Judge Silberman's concurrence is contrary to the teachings of this Court that interpreting congressional legislation and deciding the constitutionality of a statute are tasks for the judiciary. *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986); *INS v. Chadha*, 462 U.S. 919, 942-43 (1983).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND DECIDED FEBRUARY 18, 2000

Tom CAMPBELL, Member, U.S. House of Representatives, et al.,

Appellants,

v.

William Jefferson CLINTON, President of the United States,

Appellee.

No. 99-5214.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 22, 1999.

Decided Feb. 18, 2000.

* * *

Before: SILBERMAN, RANDOLPH, and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Appendix A

Separate concurring opinion filed by Circuit Judge SILBERMAN.

Separate opinion concurring in the judgment filed by Circuit Judge RANDOLPH.

Separate concurring opinion filed by Circuit Judge TATEL.

SILBERMAN, Circuit Judge:

A number of congressmen, led by Tom Campbell of California, filed suit claiming that the President violated the War Powers Resolution and the War Powers Clause of the Constitution by directing U.S. forces' participation in the recent NATO campaign in Yugoslavia. The district court dismissed for lack of standing. We agree with the district court and therefore affirm.

I.

On March 24, 1999, President Clinton announced the commencement of NATO air and cruise missile attacks on Yugoslav targets. Two days later he submitted to Congress a report, "consistent with the War Powers Resolution," detailing the circumstances necessitating the use of armed forces, the deployment's scope and expected duration, and asserting that he had "taken these actions pursuant to [his] authority . . . as Commander in Chief and Chief Executive." On April 28, Congress voted on four resolutions related to the Yugoslav conflict: It voted down a declaration of war 427 to 2 and an "authorization" of the air strikes 213 to 213,

but it also voted against requiring the President to immediately end U.S. participation in the NATO operation and voted to fund that involvement. The conflict between NATO and Yugoslavia continued for 79 days, ending on June 10 with Yugoslavia's agreement to withdraw its forces from Kosovo and allow deployment of a NATO-led peacekeeping force.[1] Throughout this period Pentagon, State Department, and NATO spokesmen informed the public on a frequent basis of developments in the fighting.

Appellants, 31 congressmen opposed to U.S. involvement in the Kosovo intervention, filed suit prior to termination of that conflict seeking a declaratory judgment that the President's use of American forces against Yugoslavia was unlawful under both the War Powers Clause of the Constitution and the War Powers Resolution ("the WPR"). See 50 U.S.C. § 1541 et seq. The WPR requires the President to submit a report within 48 hours "in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and to "terminate any use of United States Armed Forces with respect to which a report was submitted (or required to be submitted), unless the Congress . . . has declared war or has enacted a specific authorization for such use of United States Armed Forces" within 60 days. Appellants claim that the President did submit a report sufficient to trigger the WPR on March 26, or in any event was required to submit a report by that date, but nonetheless failed to end U.S. involvement

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1. U.S. forces are currently stationed in Kosovo, which remains part of Yugoslavia, as part of the peacekeeping operation, but appellants do not claim that this deployment is relevant to their case.

in the hostilities after 60 days. The district court granted the President's motion to dismiss, see Campbell v. Clinton, 52 F.Supp.2d 34 (D.D.C.1999), and this appeal followed.

II.

The government does not respond to appellants' claim on the merits. Instead the government challenges the jurisdiction of the federal courts to adjudicate this claim on three separate grounds: the case is moot; appellants lack standing, as the district court concluded; and the case is nonjusticiable. Since we agree with the district court that the congressmen lack standing it is not necessary to decide whether there are other jurisdictional defects.

The question whether congressmen have standing in federal court to challenge the lawfulness of actions of the executive was answered, at least in large part, in the Supreme Court's recent decision in Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). Raines involved a constitutional challenge to the President's authority under the short-lived Line Item Veto Act. Individual congressmen claimed that under that Act a President could veto (unconstitutionally) only part of a law and thereby diminish the institutional power of Congress. Observing it had never held that congressmen have standing to assert an institutional injury as against the executive, see id. at 821, 117 S.Ct. 2312,[2]

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2. The Court noted that it had found standing for a congressman in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), where he was unconstitutionally excluded from Congress, thus depriving him of a salary and the House seat he was

(Cont'd)

the Court held that petitioners in the case lacked "legislative standing" to challenge the Act. The Court noted that petitioners already possessed an adequate political remedy, since they could vote to have the Line Item Veto Act repealed, or to provide individual spending bills with a statutory exemption. See id. at 829, 117 S.Ct. 2312.

Thereafter in Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C.Cir.1999), emphasizing the separation-of-powers problems inherent in legislative standing, we held that congressmen had no standing to challenge the President's introduction of a program through executive order rather than statute. As in Raines, appellants contended that the President's action inflicted an institutional injury upon Congress, in this case by circumventing its legislative authority, but, we said,

> It is uncontested that the Congress could terminate the [contested program] were a sufficient number in each House so inclined. Because the parties' dispute is therefore fully susceptible to political resolution, we would [under circuit precedent] dismiss the complaint to avoid "meddl[ing] in the internal affairs of the legislative branch."

(Cont'd)

constitutionally due, both personal injuries. The Court did not decide whether congressmen would have standing to challenge actions of Congress which diminished their institutional role. Cf. Michel v. Anderson, 14 F.3d 623 (D.C.Cir.1994) (congressmen had standing to challenge House rule which diluted their vote in Committee of the Whole).

> Applying Raines, we would reach the same conclusion.

Id. at 116 (citation omitted).

There remains, however, a soft spot in the legal barrier against congressional legal challenges to executive action, and it is a soft spot that appellants sought to penetrate. In 1939 the Supreme Court in Coleman v. Miller voted 5-4 to recognize the standing of Kansas State legislators in the Supreme Court to challenge the actions of the Kansas Secretary of State and the Secretary of the State Senate. See 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). That case arose out of a State Senate vote on the ratification of a constitutional amendment, the Child Labor Amendment, proposed by Congress in 1924. The State Senate split 20 to 20, and the Lieutenant Governor, the presiding officer of the Senate, then cast a deciding vote in favor. The State House subsequently also passed a ratification resolution. Thereupon the twenty State Senators who voted against ratification plus one more (who presumably had voted for the resolution) brought a mandamus action in the State Supreme Court challenging the Lieutenant Governor's right to vote.[3] They sought an order compelling the Secretary of

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3. The government also challenges the congressmen's standing on the basis that they do not constitute a majority of the Congress. In Raines the Supreme Court did "attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action," but it declined to say how much importance. Raines, 521 U.S. at 829-30, 117 S.Ct. 2312. Because we find that appellants lack standing for another reason, we need not discuss that issue.

the Senate to erase the endorsement on the resolution and restraining the Secretary of State from authenticating the resolution and passing it on to the Governor. The Supreme Court of Kansas entertained the action but ruled against the plaintiffs on the merits. Granting certiorari, the United States Supreme Court determined that "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution . . . have an interest . . . sufficient to give the Court jurisdiction," id. at 446, 59 S.Ct. 972, because they have a legal interest "in maintaining the effectiveness of their votes." Id. at 438, 59 S.Ct. 972.

In Raines the plaintiff congressmen had relied on Coleman to argue that they had standing because the presidential veto had undermined the "effectiveness of their votes." The Supreme Court noted that Coleman might be distinguished on grounds that the federal constitutional separation of powers concerns that underlay its decision in Raines (and which we emphasized in Chenoweth) were not present, or that if the Court in Coleman had not taken the case a question of federal law — the ratification vel non by the Kansas Legislature — would remain as decided by the Kansas Court. But cf. Coleman, 307 U.S. at 465-66, 59 S.Ct. 972 (opinion of Frankfurter, J.). But the Court thought it unnecessary to cabin Coleman on those grounds. See Raines, 521 U.S. at 824 n. 8, 117 S.Ct. 2312. Instead, the Court emphasized that the congressmen were not asserting that their votes had been "completely nullified":

> They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. . . .

> Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the Coleman legislators had been nullified . . .
>
> In addition, a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill. . . .

Id. at 824, 117 S.Ct. 2312.

Here the plaintiff congressmen, by specifically defeating the War Powers Resolution authorization by a tie vote and by defeating a declaration of war, sought to fit within the Coleman exception to the Raines rule. This parliamentary tactic led to an extensive argument before us as to exactly what the Supreme Court meant by a claim that a legislator's vote was completely "nullified."

It is, to be sure, not readily apparent what the Supreme Court meant by that word. It would seem the Court used nullify to mean treating a vote that did not pass as if it had, or vice versa. The "nullification" alleged in this case therefore differs from Coleman in a significant respect. In that case state officials endorsed a defeated ratification, treating it as approved, while the President here did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization, but instead "pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive." See Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 Weekly Comp. Pres. Doc. 528

(March 26, 1999). The Court did not suggest in Raines that the President "nullifies" a congressional vote and thus legislators have standing whenever the government does something Congress voted against, still less that congressmen would have standing anytime a President allegedly acts in excess of statutory authority. As the government correctly observes, appellants' statutory argument, although cast in terms of the nullification of a recent vote, essentially is that the President violated the quarter-century old War Powers Resolution. Similarly, their constitutional argument is that the President has acted illegally — in excess of his authority — because he waged war in the constitutional sense without a congressional delegation. Neither claim is analogous to a Coleman nullification.

We think the key to understanding the Court's treatment of Coleman and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation. It is not at all clear whether once the amendment was "deemed ratified," see Raines, 521 U.S. at 822, 117 S.Ct. 2312, the Kansas Senate could have done anything to reverse that position.[4] We think that must be what the Supreme Court implied when it said the Raines plaintiffs could not allege that the "[Line Item Veto Act] would nullify their votes in the future," and that, after all, a majority of senators and congressmen could always repeal the Line Item Veto Act. Id. at 824, 117 S.Ct. 2312 (emphasis added). The Coleman senators, by contrast,

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4. See Coleman, 307 U.S. at 450, 59 S.Ct. 972 ("[T]he question of the efficacy of ratifications of state legislatures, in the light of . . . attempted withdrawal, should be regarded as a political question. . . .").

may well have been powerless to rescind a ratification of a constitutional amendment that they claimed had been defeated. In other words, they had no legislative remedy. Under that reading — which we think explains the very narrow possible Coleman exception to Raines — appellants fail because they continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the "war."

In this case, Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure — albeit only a concurrent resolution — introduced to require the President to withdraw U.S. troops. Unfortunately, however, for those congressmen who, like appellants, desired an end to U.S. involvement in Yugoslavia, this measure was defeated by a 139 to 290 vote. Of course, Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.

* * *

Appellants' constitutional claim stands on no firmer footing. Appellants argue that the War Powers Clause of the Constitution proscribes a President from using military force except as is necessary to repel a sudden attack. But they also argue that the WPR "implements" or channels congressional authority under the Constitution. It may well be then that since we have determined that appellants lack standing to enforce the WPR there is nothing left of their constitutional

claim. Assuming, however, that appellants' constitutional claim should be considered separately, the same logic dictates they do not have standing to bring such a challenge. That is to say Congress has a broad range of legislative authority it can use to stop a President's war making, see generally John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167 (1996), and therefore under Raines congressmen may not challenge the President's war-making powers in federal court.

Judge Randolph asserts that appellants lack standing because they do not claim that the President violated various statutes that depend on the existence of a war or the imminence of war. But that position sidesteps appellants' basic claim that the President unconstitutionally conducted a war without authority, and the logic of Judge Randolph's reasoning ("There is no suggestion that despite the vote, President Clinton invaded Yugoslavia by land or took some other action authorized only during a declared war.") is that if there had been a "war" appellants would have had standing. See infra at 22 (Randolph, J., concurring).[5] He therefore presents as an alternate reason for denying standing that the President did not "nullify" the vote against the declaration of war because he did not take any actions that constitute "war" in the constitutional sense. See id. at 20-22. That analysis, however, conflates standing with the merits. At the standing stage we must take as correct appellants' claim that

5. It is certainly not logically necessary for appellants to assert a violation of the statutes (three of which do not even depend on a declaration of war) relied upon by the concurrence in order to make their constitutional claim.

the President violated the Constitution simply by ordering U.S. forces to attack Yugoslavia.

In our view Judge Randolph's criticism of our analysis does not give sufficient attention to Raines' focus on the political self-help available to congressmen. See infra at 23 (Randolph, J., concurring). Even though the congressmen in Raines sought review before the Court of what was soon after determined in Clinton v. City of New York, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998), to be an unconstitutional statute, the Court denied them standing as congressmen because they possessed political tools with which to remedy their purported injury. Our colleague notes a distinction drawn by Raines between "the right to vote in the future [and] the nullification of a vote in the past," see infra at 23 (Randolph, J., concurring), and asserts that the former does not remedy the latter. But Raines rejected this argument, which is why the congressmen in Raines lacked standing whereas petitioners in New York were allowed to contest the President's "nullification" of particular appropriations line items. Indeed, Raines explicitly rejected Judge Randolph's argument that legislators should not be required to turn to politics instead of the courts for their remedy. Although the plaintiff legislators in Raines had already failed to stop passage of the Line Item Veto Act, the Court's response was the equivalent of "if at first you don't succeed, try and try again" — either work for repeal of the Act, or seek to have individual spending bills made exempt. See Raines, 521 U.S. at 824-25, 825 n. 9, 830. Judge Randolph overlooks this key portion of Raines when he disagrees with our conclusion that plaintiffs lack standing

because they may "fight again tomorrow." Infra at 23 (Randolph, J., concurring).[6]

* * *

Accordingly, the district court is affirmed; appellants lack standing.

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6. Judge Randolph also contends that our opinion is in conflict with Chenoweth v. Clinton, 181 F.3d 112, 116-17 (D.C.Cir.1999). But as we have already described that opinion, see supra at 21, it too focused on the political options available to congressmen when denying them standing. Chenoweth did not hold, as Judge Randolph would have it, that Kennedy v. Sampson, 511 F.2d 430 (D.C.Cir.1974), survived Raines. Instead, we stressed the increased emphasis placed by such post-Kennedy cases as Raines on separation of powers concerns. See Chenoweth, 181 F.3d at 113-15. Although appellants' injury in Chenoweth was "precisely the harm we held in . . . Kennedy to be cognizable under Article III," it was also "identical to the injury the Court in Raines deprecated as 'widely dispersed' and 'abstract,' " and therefore we affirmed the district court's dismissal for lack of standing. Id. We only suggested tentatively that "Kennedy may remain good law . . . as a peculiar application of the narrow rule announced in" Coleman. See id. at 116 (emphasis added). Indeed, Judge Tatel understandably read our opinion to "essentially overrule[ ] the theory of legislative standing recognized in Kennedy. . . ." See id. at 117 (Tatel, J., concurring). In any event, Chenoweth's discussion of Kennedy's fate after Raines was dicta, and we need not decide for purposes of this case if Kennedy, which involved the special question of a pocket veto, survived Raines.

Appendix A

SILBERMAN, Circuit Judge, concurring:

Appellants argued that we should consider in our standing analysis that if congressmen lack standing only military personnel might be able to challenge a President's arguably unlawful use of force, and it would be undesirable to put the armed forces in such a position. Although that is not a consideration that bears on standing, see Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), that argument leads me to observe that, in my view, no one is able to bring this challenge because the two claims are not justiciable. We lack "judicially discoverable and manageable standards" for addressing them, and the War Powers Clause claim implicates the political question doctrine. See Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Prior litigation under the WPR has turned on the threshold test whether U.S. forces are engaged in hostilities or are in imminent danger of hostilities. But the question posed by appellants — whether the President's refusal to discontinue American activities in Yugoslavia violates the WPR — necessarily depends on the statute having been triggered in the first place. It has been held that the statutory threshold standard is not precise enough and too obviously calls for a political judgment to be one suitable for judicial determinations. See, e.g., Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C.Cir.1985) (aid to Contras); Crockett v. Reagan, 720 F.2d 1355, 1356- 57 (D.C.Cir.1983) (U.S. advisors in El Salvador); see also Ange v. Bush, 752 F.Supp. 509, 514 (D.D.C.1990) (pre-Gulf War buildup); Lowry v. Reagan, 676 F.Supp. 333, 340 n. 53 (D.D.C.1987) (reflagging

operations in the Persian Gulf). I think that is correct. Appellants point to a House Report suggesting that hostilities for purposes of the WPR include all situations "where there is a reasonable expectation that American military personnel will be subject to hostile fire." See H.R. REP. NO. 287, 93rd Cong., 1st Sess. 7 (1973). That elaboration hardly helps. It could reasonably be thought that anytime American soldiers are confronted by armed or potentially armed forces of a non-ally there is a reasonable expectation that they will be subject to hostile fire. Certainly any competent military leader will assume that to be so.

Appellants argue that here there is no real problem of definition because this air war was so overwhelming and indisputable. It is asserted that the President implicitly conceded the applicability of the WPR by sending the report to Congress. In truth, the President only said the report was "consistent" with the WPR. In any event, I do not think it matters how clear it is in any particular case that "hostilities" were initiated if the statutory standard is one generally unsuited to judicial resolution.

Nor is the constitutional claim justiciable. Appellants contend this case is governed by Mitchell v. Laird, 488 F.2d 611, 614 (D.C.Cir.1973), where we said that "[t]here would be no insuperable difficulty in a court determining whether" the Vietnam conflict constituted a war in the Constitutional sense. See also Dellums v. Bush, 752 F.Supp. 1141, 1146 (D.D.C.1990) ("[T]he Court has no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen . . . could be described as a 'war' within the meaning . . . of the Constitution."). But a careful

reading of both cases reveals that the language upon which appellants rely is only dicta. (In Laird the Court ultimately held that the resolution of the issues was a political question. See 488 F.2d at 616.)[1]

Appellants cannot point to any constitutional test for what is war. See, e.g., Holtzman v. Schlesinger, 414 U.S. 1316, 94 S.Ct. 8, 38 L.Ed.2d 28 (1973) (Justice Douglas, in chambers, vacating order of Court of Appeals granting stay of district court's injunction against bombing of Cambodia), 414 U.S. at 1321, 94 S.Ct. 8 (1973) (Justice Marshall, in chambers, granting stay the same day with the concurrence of the other Justices); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.1973) (holding legality of Cambodia bombing nonjusticiable because courts lack expertise to determine import of various military actions). Instead, appellants offer a rough definition of war provided in 1994 by an Assistant Attorney General to four Senators with respect to a planned intervention in Haiti, as well as a number of law review articles each containing its own definition of war. I do not

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1. The additional cases upon which Judge Tatel relies with respect to this point were also held to present political questions. See Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir.1971) ("All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting congressional claim of authority but with steady congressional support, the Constitution has not been breached."); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir.1971) (whether Vietnam conflict required a declaration of war was a political question); Berk v. Laird, 429 F.2d 302 (2d Cir.1970) (denying a preliminary injunction against dispatch of soldier to Vietnam because whether Congress had authorized conflict was a political question).

think any of these sources, however, offers a coherent test for judges to apply to the question what constitutes war, a point only accentuated by the variances, for instance, between the numerous law review articles. For that reason, I disagree with Judge Tatel's assertion that we can decide appellants' constitutional claim because it is somehow obvious in this case that our country fought a war. See infra at 22 (Tatel, J., concurring). Baker v. Carr speaks of a case involving "a lack of judicially discoverable and manageable standards for resolving" the issue presented, see 369 U.S. at 217, 82 S.Ct. 691, not just a case the facts of which are obscure; the focus is on the standards. Even if this court knows all there is to know about the Kosovo conflict, we still do not know what standards to apply to those facts.

Judge Tatel points to numerous cases in which a court has determined that our nation was at war, but none of these cases involved the question whether the President had "declared war" in violation of the Constitution. For instance, in Bas v. Tingy, 4 U.S. (4 Dall.) 37, 1 L.Ed. 731 (1800), the question whether there was a "war" was only relevant to determining whether France was an "enemy" within the meaning of a prize statute. See id. at 37 ("[T]he argument turned, principally, upon two inquiries: 1st. Whether the Act of March 1799, applied only to the event of a future general war? 2d. Whether France was an enemy of the United States, within the meaning of the law?"). Indeed, Justice Washington's opinion in that case, upon which Judge Tatel principally relies, suggests that whether there was a war in the constitutional sense was irrelevant. See id. at 42 ("Besides, it may be asked, why should the rate of salvage be different in such a war as the present, from the salvage in

a war more solemn [i.e. a declared war] or general?"). It is similarly irrelevant that courts have determined the existence of a war in cases involving insurance policies and other contracts, the Federal Tort Claims Act, and provisions of the military criminal code applicable in "time of war." See infra at 20-21 (Tatel, J., concurring). None of these cases asked whether there was a war as the Constitution uses that word, but only whether a particular statutory or contractual provision was triggered by some instance of fighting. Comparing Bas v. Tingy's lengthy discussion whether our quarrel with France constituted a solemn or imperfect, general or limited war, see 4 U.S. at 40-41, with today's propensity to label any widespread conflict an undifferentiated war, it would not be surprising if an insurance contract's "war" provisions, or even a statute's for that matter, were triggered before the Constitution's.

Even assuming a court could determine what "war" is, it is important to remember that the Constitution grants Congress the power to declare war, which is not necessarily the same as the power to determine whether U.S. forces will fight in a war. This distinction was drawn in the Prize Cases, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862). There, petitioners challenged the authority of the President to impose a blockade on the secessionist States, an act of war, where Congress had not declared war against the Confederacy. The Court, while recognizing that the President "has no power to initiate or declare a war," observed that "war may exist without a declaration on either side." Id. at 668. In instances where war is declared against the United States by the actions of another country, the President "does not initiate the war, but is bound to accept the challenge

without waiting for any special legislative authority." Id. Importantly, the Court made clear that it would not dispute the President on measures necessary to repel foreign aggression. The President alone

> must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Id. at 670.[2] And, to confirm the independent authority of the President to meet foreign aggression, the Court noted that while Congress had authorized the war, it may not have been required to: "If it were necessary to the technical existence

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2. Judge Tatel's reliance on the Prize Cases as an example of the Court concluding a war exists is misplaced because the Court itself did not label the Civil War such, but instead deferred to the President's determination that the country was at war. See 67 U.S. (2 Black) at 670 ("Whether the President in fulfilling his duties, as Commander-in-chief . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted") (emphasis in original). Therefore, the Court's assertion that "it is bound to notice and to know" the war, see id. at 667, provides no support for the proposition that a court itself may decide when in fact there is one. The Prize Cases thus refute the suggestion in Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 2 L.Ed. 15 (1801), that only acts of Congress are evidence of the existence of a war. See infra at 20 (Tatel, J., concurring).

of a war, that it should have a legislative sanction, we find it. . . ." Id. (emphasis added).

I read the Prize Cases to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected. See Geoffrey Corn, Presidential War Power: Do the Courts Offer Any Answers?, 157 MIL. L. REV. 180, 214 (1998); J. Gregory Sidak, To Declare War, 41 DUKE L.J. 27, 54 (1991); Cyrus R. Vance, Striking the Balance: Congress and the President Under the War Powers Resolution, 133 U. PA. L. REV. 79, 85 (1984). Therefore, I assume, arguendo, that appellants are correct and only Congress has authority to initiate "war." If the President may direct U.S. forces in response to third-party initiated war, then the question any plaintiff who challenges the constitutionality of a war must answer is, who started it? The question of who is responsible for a conflict is, as history reveals, rather difficult to answer, and we lack judicial standards for resolving it. See, e.g., Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332, 1337-38 (S.D.N.Y.1984) (court lacked judicially manageable standards to decide if placement of U.S. cruise missiles in England was a war-like, "aggressive" act). Then there is the problem of actually discovering the necessary information to answer the question, when such information may be unavailable to the U.S. or its allies, or unavailable to courts due to its sensitivity. See id. at 1338. Perhaps Yugoslavia did pose a threat to a much wider region of Europe and to U.S. civilian and military interests and personnel there.

Appendix A

Judge Tatel does not take into account the Prize Cases when he concludes that the President was not exercising his independent authority to respond to foreign aggression because "in fact, the Kosovo issue had been festering for years." See infra at 22 (Tatel, J., concurring). As quoted above the President alone "must determine what degree of force the crisis demands." See 67 U.S. at 670. Judge Tatel would substitute our judgment for the President's as to the point at which an intervention for reasons of national security is justified, after which point — when the crisis is no longer acute — the President must obtain a declaration of war. One should bear in mind that Kosovo's tensions antedate the creation of this republic.

In most cases this will also be an issue of the greatest sensitivity for our foreign relations. Here, the President claimed on national television that our country needed to respond to Yugoslav aggression to protect our trading interests in Europe, and to prevent a replay of World War I. A pronouncement by another branch of the U.S. government that U.S. participation in Kosovo was "unjustified" would no doubt cause strains within NATO. Cf. United States v. New, 50 M.J. 729, 739-40 (Army Ct.Crim.App.1999) (lawfulness of U.N. peacekeeping operation in Macedonia was a political question).

In sum, there are no standards to determine either the statutory or constitutional questions raised in this case, and the question of whether the President has intruded on the war-declaring authority of Congress fits squarely within the political question doctrine. We therefore have another basis for our affirming the district court's dismissal of appellants' case.

Appendix A

RANDOLPH, Circuit Judge, concurring in the judgment:

The majority opinion does not, I believe, correctly analyze plaintiffs' standing to sue. It misconceives the holding of Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), and conflicts with the law of this circuit. I believe plaintiffs lack standing, at least to litigate their constitutional claim, but for reasons the majority opinion neglects. I also believe that the case is moot, an optional disposition of the appeal.[1] The serious questions about the constitutionality of the War Powers Resolution[2] must therefore be put off for still another day.

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1. While we may be required to decide jurisdictional issues before disposing of a case on the merits, we are not required to decide jurisdictional questions in any particular order. See Arizonans for Official English v. Arizona, 520 U.S. 43, 66-67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C.Cir.1999) (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999)). Specifically, we may assume standing when dismissing a case as moot. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., __ U.S. __, at __, 120 S.Ct. 693, 703-04, 145 L.Ed.2d 610 (2000) (citing Arizonans, 520 U.S. at 66-67, 117 S.Ct. 1055).

2. I include as an Addendum to this opinion President Nixon's 1973 message to the House of Representatives explaining why he vetoed the War Powers Resolution on the grounds of its unconstitutionality.

Appendix A

I. Standing

The Constitution reserves the power to declare "war"[3] to Congress and delegates the power to conduct war to the President. Compare U.S. Const. art. I, § 8, cl. 11, with id. art. II, § 2. When President Clinton committed armed forces to the attack on the Federal Republic of Yugoslavia, he did so without a declaration of war from Congress. On April 28, 1999, after air operations and missile strikes were underway, the House of Representatives voted 427 to 2 against a declaration of war. See H.R.J. Res. 44, 106th Cong. (1999); 126 Cong. Rec. H2440-41 (daily ed. Apr. 28, 1999).

The War Powers Resolution, passed over President Nixon's veto in 1973, implements Congress's power to

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3. War may be defined [as] the exercise of violence under sovereign command against withstanders; force, authority and resistance being the essential parts thereof. Violence, limited by authority, is sufficiently distinguished from robbery, and like outrages; yet consisting in relation towards others, it necessarily requires a supposition of resistance, whereby the force of war becomes different from the violence inflicted upon slaves or yielding malefactors.

SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (facsimile ed., Times Books, Ltd., London 1978) (1755). See United States v. Bajakajian, 524 U.S. 321, 335, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (citing Johnson); Nixon v. United States, 506 U.S. 224, 229-30, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (same); see also Bas v. Tingy, 4 U.S. (4 Dall.) 37, 1 L.Ed. 731 (1800) (relying on Blackstone and other commentators to distinguish between perfect and imperfect wars).

declare war under the Constitution. See 50 U.S.C. § 1541(a)-(b). It commands the President to "terminate any use of United States Armed Forces" within sixty days "unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States." 50 U.S.C. § 1544(b). The Senate, on March 23, 1999, passed a concurrent resolution providing that "the President of the United States is authorized to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia." S. Con. Res. 21, 106th Cong. (1999); 145 CONG. REC. S3118 (daily ed. Mar. 23, 1999). The House rejected that measure by a tie vote on April 28, 1999. See 126 CONG. REC. H2451-52 (daily ed. Apr. 28, 1999).

The Members of Congress appearing as plaintiffs contend that President Clinton violated the Constitution and the War Powers Resolution and that they are entitled to a judicial declaration so stating. They have standing, they say, because President Clinton's prosecution of the war "completely nullified" their votes against declaring war and against authorizing a continuation of the hostilities. See Amended Complaint ¶ 18; Brief for Plaintiffs-Appellants at 8, 16.

A.

The quoted phrase — "completely nullified" — is from Raines v. Byrd, 521 U.S. 811, 823, 117 S.Ct. 2312, 138

L.Ed.2d 849 (1997), giving the Court's appraisal of the rule in Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). The majority opinion in our case seems to assume that the only thing left of legislative standing is whatever Raines preserves. I will not quarrel with the assumption, at least for cases in which a legislator is claiming that his vote has been illegally nullified.[4] The heart of the Raines decision is this: "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823, 117 S.Ct. 2312.[5]

Here, plaintiffs had the votes "sufficient to defeat" "a specific legislative action" — they defeated a declaration of war (their constitutional claim) and they blocked a resolution

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4. The Court has "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests," Arizonans, 520 U.S. at 65, 117 S.Ct. 1055 (citing Karcher v. May, 484 U.S. 72, 82, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987)). Compare INS v. Chadha, 462 U.S. 919, 930 n. 5, 939-40, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), in which the "Court held Congress to be a proper party to defend [a] measure's validity where both Houses, by resolution, had authorized intervention in the lawsuit," and the executive branch refused to defend the one-House veto provision. 520 U.S. at 65 n. 20, 117 S.Ct. 1055.

5. A vote is "completely nullified" when it is "deprived of all validity," Raines, 521 U.S. at 822, 117 S.Ct. 2312, "overridden and virtually held for naught," id. at 822-23, 117 S.Ct. 2312, or "stripped of its validity," id. at 824 n. 7, 117 S.Ct. 2312.

approving the President's continuation of the war (their statutory claim). To follow precisely the formulation in Raines, they would have standing only if the legislative actions they defeated went "into effect." Obviously, this did not happen: war was not declared, and the President never maintained that he was prosecuting the war with the House's approval.

Plaintiffs' reply is that the President's military action against Yugoslavia without congressional authorization had the effect of completely nullifying their votes, of making their votes worthless. With respect to their vote against declaring war, that clearly is not true. A congressional declaration of war carries with it profound consequences.[6] The United States Code is thick with laws expanding executive power "in time of war." See OFFICE OF THE JUDGE ADVOCATE GENERAL, UNITED STATES AIR FORCE, DIGEST OF WAR AND EMERGENCY

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6. Although the United States has committed its armed forces into combat more than a hundred times, Congress has declared war only five times: the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, World War I, and World War II. See CONGRESSIONAL RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1789-1989 (Ellen C. Collier ed., 1989), reprinted in THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 650 (2d ed.1993); OFFICE OF THE LEGAL ADVISER, U.S. DEPARTMENT OF STATE, THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIETNAM (1966), reprinted in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583, 597 (Richard A. Falk ed., 1968) (listing 125 incidents prior to the Vietnam Conflict).

Appendix A

LEGISLATION AFFECTING THE DEPARTMENT OF DEFENSE 171-84 (1996) (listing statutes "effective in time of war"); cf. id. at 185-91 (listing statutes "effective in time of national emergency declared by the President"); id. at 192-98 (listing statutes "effective in time of national emergency declared by Congress").[7] Under these laws, the President's authority over industries, the use of land, and the terms and conditions of military employment is greatly enhanced.[8] A declaration of war may also have the effect of

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7. In the early days of the Republic, the power of the executive in time of war was constrained by an absence of legislation. For example, in Brown v. United States, 12 U.S. (8 Cranch) 110, 3 L.Ed. 504 (1814), the Court rejected the argument that the President had the authority to confiscate enemy property found within the United States without explicit statutory authority even during a declared war. See id. at 129. The same reasoning was applied to the taking of ships on the high seas in Little v. Barreme, 6 U.S. (2 Cranch) 170, 2 L.Ed. 243 (1804). Even in the wake of World War II, after Congress passed a large number of war-related measures, the Court strictly construed the President's authority. The most notable example, of course, is Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); cf. also Dames & Moore v. Regan, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

8. See, e.g., 10 U.S.C. § 2538 (authorizing the President to "take immediate possession of any plant that is equipped to manufacture, or that . . . is capable of manufacturing" war material "in time of war or when war is imminent"); 10 U.S.C. § 2644 ("In time of war, the President, through the Secretary of Defense, may take possession and assume control of all or part of any system of

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decreasing commercial choices and curtailing civil liberties.[9] See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218-19 (1998) ("Without question the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war — the Schenck and Hirabayashi opinions make this clear. . . . [B]ut from the point of view of governmental authority under the Constitution, it is clear that the President may do many things in carrying out a congressional directive that he may not be able to do on his own.").

(Cont'd)
transportation to transport troops, war material, and equipment, or for other purposes related to the emergency."); 10 U.S.C. § 2663(b) ("In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation under subsection (a), take and use the land to the extent of the interest sought to be acquired."); 50 U.S.C. § 1829 ("Notwithstanding any other provision of law, the President, through the Attorney General, may authorize physical searches without a court order . . . to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress.").

9. See, e.g., 18 U.S.C. § 2388(a) ("Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempts to do so — Shall be fined under this title or imprisoned not more than twenty years, or both."); 18 U.S.C. § 3287 (tolling statute of limitations for any offense involving fraud against the property of the United States until three years after the termination of hostilities).

Appendix A

The vote of the House on April 28, 1999, deprived President Clinton of these powers. The vote against declaring war followed immediately upon the vote not to require immediate withdrawal. Those who voted against a declaration of war did so to deprive the President of the authority to expand hostilities beyond the bombing campaign and, specifically, to deprive him of the authority to introduce ground troops into the conflict. See 145 CONG. REC. H2427-41 (daily ed. Apr. 28, 1999). There is no suggestion that despite the vote, President Clinton invaded Yugoslavia by land or took some other action authorized only during a declared war. It follows that plaintiffs' votes against declaring war were not for naught. For that reason, plaintiffs do not have standing to sue on their constitutional claim.

As to their claim under the War Powers Resolution, the beauty of this measure, or one of its defects (see the Addendum to this opinion), is in its automatic operation: unless a majority of both Houses declares war, or approves continuation of hostilities beyond 60 days, or Congress is "physically unable to meet as a result of an armed attack upon the United States," the Resolution requires the President to withdraw the troops. 50 U.S.C. § 1544(b). The President has nothing to veto. Congress may allow the time to run without taking any vote, or it may — as the House did here — take a vote and fail to muster a majority in favor of continuing the hostilities.

To put the matter in terms of Raines once again, plaintiffs had the votes "sufficient to defeat" "a specific legislative action" — they blocked a resolution authorizing the President's continuation of the war with Yugoslavia — but

it is not true, in the language of Raines, that this "legislative action" nevertheless went "into effect." Congressional authorization simply did not occur. The President may have acted as if he had Congress's approval, or he may have acted as if he did not need it. Either way, plaintiffs' real complaint is not that the President ignored their votes; it is that he ignored the War Powers Resolution, and hence the votes of an earlier Congress, which enacted the law over President Nixon's veto. It is hard for me to see that this amounts to anything more than saying: "We, the members of Congress, have standing because the President violated one of our laws." To hold that Members of Congress may litigate on such a basis strikes me as highly problematic, not only because the principle is unconfined but also because it raises very serious separation-of-powers concerns. See Raines, 521 U.S. at 825 n. 8, 117 S.Ct. 2312; Barnes v. Kline, 759 F.2d 21, 41 (D.C.Cir.1985) (Bork, J., dissenting), vacated as moot, 479 U.S. 361, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987). But because the case is moot, I need say no more.

B.

The majority opinion analyzes standing rather differently than I do. It says plaintiffs lack standing to pursue their statutory claim because "they continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the 'war.' " Maj. op. at 23. For specifics, the opinion points out that Congress defeated House Concurrent Resolution 82, a resolution requiring immediate disengagement from the conflict in Yugoslavia; that "Congress always retains appropriations authority and could have cut off funds for

the American role in the conflict";[10] and that "there always remains the possibility of impeachment." Id.[11] The same reason — the possibility of future legislative action — is used to defeat plaintiffs' standing with respect to their constitutional claim. Id. at 23.

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10. The majority attaches some importance to Congress's decision to authorize funding for Operation Allied Force and argues that Congress could have denied funding if it wished to end the war. However, in Mitchell v. Laird, 488 F.2d 611, 616 (D.C.Cir.1973), we held that, as "every schoolboy knows," Congress may pass such legislation, not because it is in favor of continuing the hostilities, but because it does not want to endanger soldiers in the field. The War Powers Resolution itself makes the same point: "Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . . from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter." 50 U.S.C. § 1547(a)(1) (emphasis added). Those portions of the Emergency Supplemental Appropriations Act, Pub.L. No. 106-31, 113 Stat. 57, relating to the attacks on Yugoslavia specified the limited purpose for the emergency appropriations, but contained no language even roughly approximating that required by the War Powers Resolution. See id., ch. 3, 113 Stat. 76-83.

11. These are not the only possibilities. "It has been thought that Congress could constitutionally cut the President's salary in half and auction off the White House, reduce the President's staff to one secretary, and limit her or him to answering personal correspondence." A. Raymond Randolph, Introduction — Disciplining Congress: The Boundaries of Legislative Power, 13 J.L. & POL. 585, 586 (1997).

The majority has, I believe, confused the right to vote in the future with the nullification of a vote in the past, a distinction Raines clearly made. See 521 U.S. at 824, 117 S.Ct. 2312. To say that your vote was not nullified because you can vote for other legislation in the future is like saying you did not lose yesterday's battle because you can fight again tomorrow. The Supreme Court did not engage in such illogic. When the Court in Raines mentioned the possibility of future legislation, it was addressing the argument that "the [Line Item Veto] Act will nullify the [Congressmen's] votes in the future. . . ." Id. This part of the Court's opinion, which the majority adopts here, is quite beside the point to our case. No one is claiming that their votes on future legislation will be impaired or nullified or rendered ineffective.

Besides, as long as Congress and the Constitution exist, Members will always be able to vote for legislation. And so the majority's decision is tantamount to a decision abolishing legislative standing. I have two problems with this. First, if we are going to get rid of legislative standing altogether, we ought to do so openly and not under the cover of an interpretation, or rather misinterpretation, of a phrase in Raines. If the Supreme Court had meant to do away with legislative standing, it would have said so and it would have given reasons for taking that step.

My second problem is just as serious, perhaps more so: the majority's decision conflicts with this court's latest legislative standing decision. In Chenoweth v. Clinton, 181 F.3d 112, 116-17 (D.C.Cir.1999), we interpreted Raines consistently with my analysis in this case and concluded that a previous legislative standing decision of this court —

Kennedy v. Sampson, 511 F.2d 430 (D.C.Cir.1974) — upholding legislative standing to challenge the legality of a pocket veto was still good law. The plaintiff in Kennedy had standing under the proper interpretation of Raines, we held, because the "pocket veto challenged in that case had made ineffective a bill that both houses of the Congress had approved. Because it was the President's veto — not a lack of legislative support — that prevented the bill from becoming law (either directly or by the Congress voting to override the President's veto), those in the majority could plausibly describe the President's action as a complete nullification of their votes." 181 F.3d at 116-17. If Chenoweth is correct, the majority opinion in this case must be wrong. If Chenoweth is correct, it is no answer to say — as the majority says in this case — that standing is lacking because, despite the pocket veto, Congress could pass the same law again, or it could retaliate by cutting off appropriations for the White House or it could impeach the President.

C.

My position, the majority complains, "sidesteps" plaintiffs' merits "claim that the President unconstitutionally conducted a war without authority," Maj. op. at 23. This is meant to be criticism? A properly-conducted standing analysis almost always avoids — sidesteps — a decision on the merits.[12] In the next breath, the majority turns around

12. The majority drops this footnote: "It is certainly not logically necessary for appellants to assert a violation of the statutes . . . relied upon by the concurrence in order to make their (Cont'd)

and contradicts itself, proclaiming that my analysis "conflates standing with the merits." Id. I am familiar with what I have written. I do not recall having rendered a judgment about whether the President violated the Constitution. The careful reader will, I think, agree with me. Nor do I present "as an alternative reason for denying standing that the President did not . . . take any actions constituting war in the constitutional sense." Id. The majority's sentence is doubly misleading. Here is my alternative reason for denying standing, pure and simple: regardless whether President Clinton waged a "war," plaintiffs never claimed that he exercised statutory authority reserved to him only when Congress has declared a war; and so their votes against declaring war cannot be considered a nullity. Thus, one, I have taken no position on whether the President engaged in a "war," and two, I say only that plaintiffs never alleged that the President utilized these statutory powers. Too often a strategy in legal argumentation is to pretend to answer an argument by misstating it.[13] My argument remains unanswered. All the majority has done is to misstate it almost as badly as it has misread Raines.

(Cont'd)
constitutional claim." Maj. op. at 23 n.5. How strange a statement. I refer to the statutes not in the context of plaintiffs' making their constitutional claim, but in regard to their standing to litigate that claim. It is as if the majority had made this brow-furrowing statement: "in order to make out their constitutional claim, it is not logically necessary for plaintiffs to assert that their votes were nullified within the meaning of Raines."

13. See also the sentence attributing to me the "argument that legislators should not be required to turn to politics instead of the courts for their remedy." Maj. op. at 24. There are other examples not worth mentioning.

Appendix A

II. Mootness

The amended complaint, filed on May 19, 1999, sought a declaratory judgment "that no later than May 25, 1999, the President must terminate the involvement of the United States Armed Forces in such hostilities unless Congress declares war, or enacts other explicit authorization, or has extended the sixty day period." Amended Complaint at 12; see 50 U.S.C. § 1544(b)(1)-(2). All agree that the "hostilities" ended by June 21, 1999, after NATO's Secretary General announced the official termination of the air campaign and Secretary of Defense Cohen announced the redeployment of more than 300 U.S. aircraft back to their home bases.

To save their case from mootness, plaintiffs therefore invoke the rule regarding issues "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911); Christian Knights of the Ku Klux Klan v. District of Columbia, 972 F.2d 365, 369-71 (D.C.Cir.1992). Plaintiffs must, but cannot, satisfy both elements to prevail. Their constitutional and statutory claims are at cross purposes.

The "evading review" part of the formulation is temporal. How quickly must an activity begin and end to evade judicial review? This depends on which court does the reviewing. The Supreme Court has treated the matter in terms of itself. Hence evading review means evading Supreme Court review, see Christian Knights, 972 F.2d at 369, which can be (though usually is not) swift review. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); Buckley v. Valeo,

424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Some undeclared wars, or in the euphemism of the day, "hostilities," are over quickly; others, like the Korean War and the war in Vietnam, last for years. Circuit precedent requires us to determine whether the activity challenged is "inherently" of a sort that evades review; circuit precedent also holds that "offensive wars initiated without congressional approval" are not in that category. Conyers v. Reagan, 765 F.2d 1124, 1128 (D.C.Cir.1985). That holding, which remains the law of the circuit, means that we must treat plaintiffs' claims as moot.

Plaintiffs' statutory claim — that President Clinton continued the war for more than 60 days without congressional authorization, in violation of the War Powers Resolution — also may not satisfy the "capable of repetition" element. There is an aspect of probability involved here. "By 'capable of repetition' the Supreme Court means 'a reasonable expectation that the same complaining party would be subject to the same action again.' " Christian Knights, 972 F.2d at 370 (quoting Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (per curiam)).[14] This introduces some complications. Who should

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14. The Supreme Court recently stated that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, __ U.S. at __, 120 S.Ct. at 709 (citing United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)). The President's cessation of the attack on Yugoslavia was not "voluntary" within the Court's meaning; the war ended because the United States won, not because the President sought to avoid litigation.

be considered the "same complaining parties"? And what is the "same action again"?

The same "complaining parties" must refer to the individual Members of Congress who brought this suit. They have sued in their official capacity and, as in Karcher v. May, 484 U.S. 72, 79-81, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), the injury they allege relates to their conduct as legislators. Thus, in assessing the likelihood of a recurrence of "the same action," the inquiry must be restricted only to the period in which these Congressmen would likely remain in office. As to the "same action," this refers to President Clinton's alleged violation of the War Powers Resolution by continuing hostilities for more than 60 days without Congress's affirmative approval. How likely is that to recur? Not very, if history is any guide. The War Powers Resolution has been in effect for a quarter of a century. Yet President Clinton is the first President who arguably violated the 60-day provision. In order to show why their claims will "evade review," plaintiffs tell us that, in modern times, United States attacks on foreign nations will be over quickly, by which they mean less than 60 days.[15] Accepting that prediction as accurate dooms their case. It means that the likelihood of this President, or some other, violating the 60-day provision of the War Powers Resolution is remote, not only because we can expect other Presidents to obtain congressional

15. "The 1998 air attack against Afghanistan and Sudan, the December 1998 air attacks against Iraq, the 1995 air assault against the Bosnian Serbs, the 1994 Haitian invasion, the 1991 Persian Gulf War, the 1989 Panama invasion, the 1986 air attack against Libya, the 1983 Grenada attack were all completed in less than 60 days." Reply Brief for Plaintiffs-Appellants at 5-6.

approval for wars lasting more than 60 days, but also because most military actions in the future (as plaintiffs agree) will be over before the 60-day limit for undeclared or unauthorized wars has been exceeded.

Appendix A

ADDENDUM

Veto of War Powers Resolution

The President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval. October 24, 1973

To the House of Representatives:

I hereby return without my approval House Joint Resolution 542 — the War Powers Resolution. While I am in accord with the desire of the Congress to assert its proper role in the conduct of our foreign affairs, the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation.

The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches.

The Founding Fathers understood the impossibility of foreseeing every contingency that might arise in this complex area. They acknowledged the need for flexibility in responding to changing circumstances. They recognized that foreign policy decisions must be made through close cooperation between the two branches and not through rigidly codified procedures.

These principles remain as valid today as they were when our Constitution was written. Yet House Joint Resolution 542 would violate those principles by defining the President's powers in ways which would strictly limit his constitutional authority.

Clearly Unconstitutional

House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after sixty days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution — an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.

I believe that both these provisions are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution — and any attempt to make such alterations by legislation alone is clearly without force.

Undermining Our Foreign Policy

While I firmly believe that a veto of House Joint Resolution 542 is warranted solely on constitutional grounds, I am also deeply disturbed by the practical consequences of this resolution. For it would seriously undermine this Nation's ability to act decisively and convincingly in times

of international crisis. As a result, the confidence of our allies in our ability to assist them could be diminished and the respect of our adversaries for our deterrent posture could decline. A permanent and substantial element of unpredictability would be injected into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war.

If this resolution had been in operation, America's effective response to a variety of challenges in recent years would have been vastly complicated or even made impossible. We may well have been unable to respond in the way we did during the Berlin crisis of 1961, the Cuban missile crisis of 1962, the Congo rescue operation in 1964, and the Jordanian crisis of 1970 — to mention just a few examples. In addition, our recent actions to bring about a peaceful settlement of the hostilities in the Middle East would have been seriously impaired if this resolution had been in force.

While all the specific consequences of House Joint Resolution 542 cannot yet be predicted, it is clear that it would undercut the ability of the United States to act as an effective influence for peace. For example, the provision automatically cutting off certain authorities after 60 days unless they are extended by the Congress could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of United States withdrawal and an adversary would be tempted therefore to postpone serious negotiations until the 60 days were up. Only after the Congress acted would there be a strong incentive for an adversary to negotiate. In addition, the very existence

of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expired.

The measure would jeopardize our role as a force for peace in other ways as well. It would, for example, strike from the President's hand a wide range of important peace-keeping tools by eliminating his ability to exercise quiet diplomacy backed by subtle shifts in our military deployments. It would also cast into doubt authorities which Presidents have used to undertake certain humanitarian relief missions in conflict areas, to protect fishing boats from seizure, to deal with ship or aircraft hijackings, and to respond to threats of attack. Not the least of the adverse consequences of this resolution would be the prohibition contained in section 8 against fulfilling our obligations under the NATO treaty as ratified by the Senate. Finally, since the bill is somewhat vague as to when the 60 day rule would apply, it could lead to extreme confusion and dangerous disagreements concerning the prerogatives of the two branches, seriously damaging our ability to respond to international crises.

Failure to Require Positive Congressional Action

I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under this resolution 60 days after they were invoked. No overt Congressional action would be required to cut off these powers — they would disappear automatically unless the Congress extended them. In effect, the Congress is here attempting to increase its policy-making role through a

provision which requires it to take absolutely no action at all.

In my view, the proper way for the Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking the responsibility of casting a yes or no vote after considering those merits. The authorization and appropriations process represents one of the ways in which such influence can be exercised. I do not, however, believe that the Congress can responsibly contribute its considered, collective judgment on such grave questions without full debate and without a yes or no vote. Yet this is precisely what the joint resolution would allow. It would give every future Congress the ability to handcuff every future President merely by doing nothing and sitting still. In my view, one cannot become a responsible partner unless one is prepared to take responsible action.

Strengthening Cooperation Between the Congress and the Executive Branches

The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the Executive and the prudent fulfillment by each branch of its constitutional responsibilities. House joint Resolution 542 includes certain constructive measures which would foster this process by enhancing the flow of information from the executive branch to the Congress. Section 3, for example, calls for consultations with the Congress before and during the involvement of the United States forces in hostilities abroad. This provision is consistent with the desire of this

Administration for regularized consultations with the Congress in an even wider range of circumstances.

I believe that full and cooperative participation in foreign policy matters by both the executive and the legislative branches could be enhanced by a careful and dispassionate study of their constitutional roles. Helpful proposals for such a study have already been made in the Congress. I would welcome the establishment of a non-partisan commission on the constitutional roles of the Congress and the President in the conduct of foreign affairs. This commission could make a thorough review of the principal constitutional issues in Executive-Congressional relations, including the war powers, the international agreement powers, and the question of Executive privilege, and then submit its recommendations to the President and the Congress. The members of such a commission could be drawn from both parties — and could represent many perspectives including those of the Congress, the executive branch, the legal profession, and the academic community.

This Administration is dedicated to strengthening cooperation between the Congress and the President in the conduct of foreign affairs and to preserving the constitutional prerogatives of both branches of our Government. I know that the Congress shares that goal. A commission on the constitutional roles of the Congress and the President would provide a useful opportunity for both branches to work together toward that common objective.

RICHARD NIXON

The White House,
October 24, 1973.

Appendix A

TATEL, Circuit Judge, concurring:

Although I agree with Judge Silberman that Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), as interpreted by this court in Chenoweth v. Clinton, 181 F.3d 112 (D.C.Cir.1999), deprives plaintiffs of standing to bring this action, I do not share his view that the case poses a nonjusticiable political question. See supra (Silberman, J., concurring). In my view, were this case brought by plaintiffs with standing, we could determine whether the President, in undertaking the air campaign in Yugoslavia, exceeded his authority under the Constitution or the War Powers Resolution.

To begin with, I do not agree that courts lack judicially discoverable and manageable standards for "determining the existence of a 'war.' " Brief of Appellee at 36. See also supra at 24-25 (Silberman, J., concurring). Whether the military activity in Yugoslavia amounted to "war" within the meaning of the Declare War Clause, U.S. Const. art. I, § 8, cl. 11, is no more standardless than any other question regarding the constitutionality of government action. Precisely what police conduct violates the Fourth Amendment guarantee "against unreasonable searches and seizures?" When does government action amount to "an establishment of religion" prohibited by the First Amendment? When is an election district so bizarrely shaped as to violate the Fourteenth Amendment guarantee of "equal protection of the laws?" Because such constitutional terms are not self-defining, standards for answering these questions have evolved, as legal standards always do, through years of judicial decisionmaking. Courts have proven no less capable of developing standards to resolve war powers challenges.

Appendix A

Since the earliest years of the nation, courts have not hesitated to determine when military action constitutes "war." In Bas v. Tingy, 4 U.S. (4 Dall.) 37, 1 L.Ed. 731 (1800), the Supreme Court had to decide whether hostilities between France and the United States amounted to a state of war in order to resolve disputes over captured ships. Because outright war had not been declared, the justices examined both the facts of the conflict ("the scene of bloodshed, depredation and confiscation, which has unhappily occurred," id. at 39) and the acts of Congress that had authorized limited military action:

> In March 1799, congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession.

Id. at 41. Given these events, Justice Bushrod Washington concluded that France and the United States were at war both "[i]n fact and in law." Id. at 42. "If they were not our enemies," he said, "I know not what constitutes an enemy." Id. at 41. One year later, Chief Justice Marshall, focusing on the same conflict with France, said: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. . . . To determine the real situation of America in regard to France, the acts of congress are to

be inspected." Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 2 L.Ed. 15 (1801).

Half a century later, in The Prize Cases, 67 U.S. (2 Black) 635, 666, 17 L.Ed. 459 (1862), the Court had to determine whether a state of war, though undeclared, existed "de facto" between the United States and the confederacy, and if so, whether it justified the U.S. naval blockade of confederate ports. "As a civil war is never publicly proclaimed, . . . its actual existence is a fact in our domestic history which the Court is bound to notice and to know." Id. at 667. There was no formal declaration of war, the Court explained, because the Constitution does not permit Congress to "declare war against a State, or any number of States." Id. at 668. Yet the Court, guided by the definition of war as "[t]hat state in which a nation prosecutes its right by force," id. at 666, determined that a state of war actually existed.

> A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

Id. at 666-67. In making this determination, the Court looked to the facts of the conflict, id., to the acts of foreign governments recognizing the war and declaring their

neutrality, id. at 669, and to congressional action authorizing the President's use of force, id. at 670-71. Given these facts, the Court refused "to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race." Id. at 669.

More recent cases have also recognized the competence of courts to determine whether a state of war exists. Responding to a challenge to the constitutionality of the Vietnam War, this circuit confronted "the critical question . . . whether the hostilities in Indo-China constitute in the Constitutional sense a 'war,' both within and beyond the meaning of that term in Article I, Section 8, Clause 11." Mitchell v. Laird, 488 F.2d 611, 614 (D.C.Cir.1973) (emphasis added). The court found "no insuperable difficulty in a court determining whether," given the extent of the hostilities, "there has been a war in Indo-China." Id. Once the war was recognized as such, the court saw no problem in "facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without Congressional approval," or "whether Congress has given, in a Constitutionally satisfactory form, the approval requisite for a war of considerable duration and magnitude." Id. Nor did the court hesitate to determine that once the Gulf of Tonkin resolution had been repealed, later congressional actions appropriating funds for the war and extending the draft were insufficient to "serve as a valid assent to the Vietnam war." Id. at 615. Given this absence of congressional approval for the war's continuation, the President had a duty to try "in good faith and to the best of his ability, to bring the war to an end as

promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation — its defense, its honor, its morality." Id. at 616. Although the court ultimately declined to answer the question whether President Nixon was in fact fulfilling his duty to end the Vietnam War, see id., it nonetheless made clear that courts are competent to adjudge the existence of war and the allocation of war powers between the President and Congress. Regardless of whether this language is dicta, see supra at 25 (Silberman, J., concurring), Mitchell supports my view that this court could resolve the war powers claims presented here. See also, e.g., Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir.1971) ("The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view."); Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir.1971) ("[T]he constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine."); Berk v. Laird, 429 F.2d 302, 305 (2d Cir.1970) ("History makes clear that the congressional power 'to declare War' conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign. . . . [E]xecutive officers are under a threshold

constitutional duty which can be judicially identified and its breach judicially determined.") (internal quotation marks and brackets omitted).

Without undue difficulty, courts have also determined whether hostilities amount to "war" in other contexts. These have included insurance policies and other contracts, see, e.g., Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 567, 261 S.W.2d 554, 559 (1953) ("We are unwilling in deciding this case to shut our eyes to what everyone knows, that there has been . . . actually and in reality a war in Korea in which the United States has been seriously engaged."); Pan Am. World Airways, Inc. v. Aetna Casualty & Sur. Co., 505 F.2d 989, 1012-15 (2d Cir.1974); Navios Corp. v. The Ulysses II, 161 F.Supp. 932 (D.Md.1958), aff'd, 260 F.2d 959 (4th Cir.1958), the Federal Tort Claims Act, see, e.g., Koohi v. United States, 976 F.2d 1328 (9th Cir.1992) (noting that even absent a formal declaration, "no one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq"); Rotko v. Abrams, 338 F.Supp. 46, 47-48 (D.Conn.1971), aff'd, 455 F.2d 992 (2d Cir.1972), and provisions of military criminal law applicable "in time of war," see, e.g., United States v. Anderson, 17 U.S.C.M.A. 588, 1968 WL 5425 (1968); United States v. Ayers, 4 U.S.C.M.A. 220, 1954 WL 2280 (1954).

Although courts have thus determined the existence of war as defined by the Constitution, statutes, and contracts, in this case plaintiffs' War Powers Resolution claim would not even require that we do so. We would need to ask only whether, and at what time, "United States Armed Forces [were] introduced into hostilities or into situations where

imminent involvement in hostilities [was] clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). On this question, the record is clear. In his report to the Speaker of the House and the President pro tempore of the Senate, transmitted "consistent with the War Powers Resolution," President Clinton stated: "on March 24, 1999, U.S. military forces, at my direction . . . began a series of air strikes in the Federal Republic of Yugoslavia. . . ." 35 Weekly Comp. Pres. Doc. 527 (March 26, 1999), available at 1999 WL 12654381. Pursuant to the priority procedures of the War Powers Resolution, 50 U.S.C. §§ 1545-46, both houses of Congress responded by expediting consideration of resolutions to declare war, H.J. Res 44, to authorize airstrikes, S.J. Res. 20, and to withdraw troops, H. Con. Res. 82. Defense Secretary William Cohen told the Senate Armed Services Committee: "We're certainly engaged in hostilities, we're engaged in combat." Hearing on Kosovo, Senate Armed Services Comm., 106th Cong., April 15, 1999, 1999 WL 221637 (testimony of William Cohen, Secretary of Defense). President Clinton issued an Executive Order designating the region a U.S. combat zone and March 24 as "the date of the commencement of combatant activities in such zone." Exec. Order No. 13,119, 64 Fed.Reg. 18797 (Apr. 13, 1999).

The undisputed facts of this case are equally compelling with respect to plaintiffs' constitutional claim. If in 1799 the Supreme Court could recognize that sporadic battles between American and French vessels amounted to a state of war, and if in 1862 it could examine the record of hostilities and conclude that a state of war existed with the confederacy, then surely we, looking to similar evidence, could determine whether months of daily airstrikes involving

800 U.S. aircraft flying more than 20,000 sorties and causing thousands of enemy casualties amounted to "war" within the meaning of Article I, section 8, clause 11.

Determining whether a state of war exists would certainly be more difficult in situations involving more limited military force over a shorter period of time. But just as we never shrink from deciding a First Amendment case simply because we can imagine a more difficult one, the fact that a challenge to a different military action might present a closer question would not justify abdicating our responsibility to construe the law and apply it to the facts of this case.

Nor is the question nonjusticiable because the President, as Commander in Chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval. Judge Silberman's suggestion notwithstanding, see supra at 27-28 (Silberman, J., concurring), President Clinton does not claim that the air campaign was necessary to protect the nation from imminent attack. In his report to Congress, the President explained that the military action was "in response to the FRY government's continued campaign of violence and repression against the ethnic Albanian population in Kosovo." 35 Weekly Comp. Pres. Doc. 527 (Mar. 26, 1999), available at 1999 WL 12654381. Although the President also said that military action would prevent an expanded war in Europe, see Radio Address of the President to the Nation, March 27, 1999, available at 1999 WL 170552, he never claimed that an emergency required him to act without congressional authorization; in fact, the Kosovo issue had been festering

for years. See Declaration of Thomas Pickering, Undersecretary of State for Political Affairs, JA at 21.

The government also claims that this case is nonjusticiable because it "requires a political, not a judicial, judgment." The government has it backwards. Resolving the issue in this case would require us to decide not whether the air campaign was wise — a "policy choice[ ] and value determination [ ] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) — but whether the President possessed legal authority to conduct the military operation. Did the President exceed his constitutional authority as Commander in Chief? Did he intrude on Congress's power to declare war? Did he violate the War Powers Resolution? Presenting purely legal issues, these questions call on us to perform one of the most important functions of Article III courts: determining the proper constitutional allocation of power among the branches of government. Although our answer could well have political implications, "the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications. . . ." INS v. Chadha, 462 U.S. 919, 942-43, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). See also Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action

denominated 'political' exceeds constitutional authority."). This is so even where, as here (and as in the other cases discussed above), the issue relates to foreign policy. See Baker, 369 U.S. at 211, 82 S.Ct. 691 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). If "we cannot shirk [our] responsibility" to decide whether an Act of Congress requires the President to impose economic sanctions on a foreign nation for diminishing the effectiveness of an international treaty, a question rife with "political overtones," Japan Whaling Ass'n, 478 U.S. at 230, 106 S.Ct. 2860, then surely we cannot shirk our responsibility to decide whether the President exceeded his constitutional or statutory authority by conducting the air campaign in Yugoslavia.

The Government's final argument — that entertaining a war powers challenge risks the government speaking with "multifarious voices" on a delicate issue of foreign policy — fails for similar reasons. Because courts are the final arbiters of the constitutionality of the President's actions, "there is no possibility of 'multifarious pronouncements' on this question." Chadha, 462 U.S. at 942, 103 S.Ct. 2764. Any short-term confusion that judicial action might instill in the mind of an authoritarian enemy, or even an ally, is but a small price to pay for preserving the constitutional separation of powers and protecting the bedrock constitutional principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch), 137, 177, 2 L.Ed. 60 (1803).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JUNE 8, 1999

Tom CAMPBELL, et al.,

Plaintiffs,

v.

William Jefferson CLINTON, President of the United States,

Defendant.

No. Civ.A. 99-1072 PLF.

United States District Court,
District of Columbia.

June 8, 1999.

* * *

OPINION

PAUL L. FRIEDMAN, District Judge.

Since March 24, 1999, the United States has been participating in an air offensive launched by the North Atlantic Treaty Organization against the Federal Republic of Yugoslavia. Plaintiffs, twenty-six members of the United States House of Representatives, seek a declaration that the President has violated the War Powers Clause of the

Constitution and the War Powers Resolution, 50 U.S.C. § 1541, et seq., by involving the United States in the air offensive without congressional authorization. The defendant is the President of the United States, who has filed a motion to dismiss this action. Upon full consideration of the defendant's motion, plaintiffs' opposition, the defendant's reply and the arguments presented by counsel at the hearing held on June 3, 1999, and for the reasons stated below, the Court concludes that plaintiffs do not have standing to raise these claims. The motion to dismiss therefore will be granted.

I. BACKGROUND

A. Constitutional and Statutory Framework

The War Powers Clause of the United States Constitution provides Congress with the power to "declare War. . . ." U.S. Constitution, Art. I, § 8, cl. 11. Congress' power to declare war works in conjunction with the authority granted to the President under the Constitution to act as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Constitution, Art. II, § 2, cl. 1. The Constitution does not further delineate the precise scope of the powers granted to the executive and legislative branches, but clearly the Framers intended to give each of the two branches a role in the conduct of foreign affairs. Essentially, Congress would declare war and raise and financially maintain armies, while the President would conduct wars.

In 1973, over President Richard Nixon's veto, Congress passed the War Powers Resolution, 50 U.S.C. § 1541,

et. seq., in order to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations." 50 U.S.C. § 1541(a). The purpose of the resolution was to ensure that the "constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c).

The War Powers Resolution provides, inter alia, that "[i]n the absence of a declaration of war, in any case in which United States Armed Forces are introduced (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours" to the Speaker of the House of Representatives and to the President pro tempore of the Senate a written report setting forth the circumstances necessitating the introduction

of forces, the constitutional and legislative authority to introduce the forces and the estimated scope and duration of the hostilities or involvement. 50 U.S.C. § 1543(a). The President also is required to submit periodic reports, at least every six months, for as long as the forces remain engaged in hostilities. 50 U.S.C. § 1543(c).

Within sixty calendar days after the President either submits a report pursuant to Section 1543(a) or is required to have submitted a report, the President must terminate the use of the United States Armed Forces described in Section 1543 unless Congress (1) has declared war or has provided specific authorization for the use of such forces, (2) has extended by law the sixty-day time period, or (3) is physically unable to meet as a result of an armed attack on the United States. 50 U.S.C. § 1544(b). The President may extend the sixty day period an additional thirty days if he determines and certifies in writing to the Congress that the continued use of forces for the additional time is necessary to safely remove the United States Armed Forces. Id. The War Powers Resolution also sets forth a mechanism so that both houses of Congress are required to give priority consideration to any resolution or bill that would provide the President with the authorization described above. See 50 U.S.C. §§ 1545, 1546, 1546a.

Finally, the War Powers Resolution explicitly provides that authority to introduce forces into hostilities shall not be inferred "from any provision of law . . . including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations

and states that it is intended to constitute specific statutory authorization within the meaning of [the War Powers Resolution]," or "from any treaty . . . unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of [the War Powers Resolution]." 50 U.S.C. § 1547(a) (emphasis added).

B. Conflict with Federal Republic of Yugoslavia

Kosovo, a region of Serbia, historically has been inhabited both by ethnic Albanians and by ethnic Serbs. See Def's Motion to Hold in Abeyance, Att. A (Declaration of Under Secretary of State for Political Affairs Thomas R. Pickering) at ¶ 3. The region gained a considerable degree of autonomy through the 1970's, and by the late 1980's ethnic Albanians constituted an "overwhelming majority of the population in Kosovo." Id. at ¶ 4. When Slobodan Milosevic came to power in Serbia in the late 1980's, he abolished the autonomous status of the province, and Kosovo's ethnic Albanians began taking various non-violent measures to resist Milosevic and the authoritarian rule of Serbia. Id. at ¶ 5. In early 1998, Serbia launched a crackdown in Kosovo, killing dozens of ethnic Albanians and causing thousands to flee the Kosovo region. Id. at ¶ 8.

Throughout 1998 and into the beginning of 1999, the United States in partnership with NATO member countries and other allies sought a diplomatic resolution to the conflict between the ethnic Albanians in Kosovo and Milosevic's

government, and it imposed various economic sanctions against the Federal Republic of Yugoslavia in an effort to force a resolution. See Pickering Declaration at ¶¶ 11-14. After the massacre of forty-five ethnic Albanian civilians in January 1999, diplomatic efforts intensified, and the Kosovo Albanians and representatives of the Serbian government participated in peace negotiations in Rambouillet, France in February 1999. Id. at ¶¶ 14, 15. On March 15, 1999, the Kosovo Albanian delegation signed the interim agreement that had been proposed in Rambouillet, but three days later negotiations were suspended because the Serbian delegation refused to accept the interim agreement. Id. at ¶ 17. By March 19, 1999, the tempo of the repressive offensive by Milosevic's armed units had intensified. Id. at ¶ 18. Milosevic's forces drove thousands of ethnic Albanians from their homes and villages, summarily executed some, displaced others and burned many of their villages. Id.

On March 21, 1999, Ambassador Richard Holbrooke made a final diplomatic effort to persuade the Milosevic government to accept the interim agreement, but he failed in that mission and departed Belgrade on March 23, 1999, without having achieved any progress towards a diplomatic resolution. Pickering Declaration at ¶ 19. That day, March 23, 1999, the Senate passed by a vote of 58 to 41 a concurrent resolution authorizing the President to "conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia (Serbia and Montenegro)." S.Con.Res. 21, 106th Cong. (1999).

The next day, March 24, 1999, United States Armed Forces in coalition with NATO allies began a series of air

strikes in the Federal Republic of Yugoslavia. See Amended Complaint at ¶ 8; Pickering Declaration at ¶ 19. That same day, by a vote of 424 to 1, the House of Representatives passed a resolution stating that it "supports the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia and recognizes their professionalism, dedication, patriotism, and courage." H.R.Res. 130, 106th Cong. (1999).

Two days later, President Clinton sent identical letters to J. Dennis Hastert, Speaker of the House of Representatives, and to Strom Thurmond, President pro tempore of the Senate. The letter opens: "At approximately 1:30 p.m. eastern standard time, on March 24, 1999, U.S. military forces, at my direction and in coalition with our NATO allies, began a series of air strikes in the Federal Republic of Yugoslavia (FRY) in response to the FRY government's continued campaign of violence and repression against the ethnic Albanian population in Kosovo." See Pls' Motion for Summ.J., Exh. 19.[1] The letter goes on to detail the circumstances that led to the decision to begin air strikes in the Federal Republic of Yugoslavia, including the atrocities committed by the Milosevic government and the Milosevic government's history of noncompliance with resolutions of the United Nations Security Council and NATO. The letter concludes: "We cannot predict with certainty how long these operations will need to continue. . . . Milosevic must stop his offensive, stop the repression and agree to a peace accord based on the framework from Rambouillet. . . . I have taken

1. Plaintiffs incorporated exhibits from their motion for summary judgment into their opposition to the President's motion to dismiss.

these actions pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive. In doing so, I have taken into account the views and support expressed by the Congress. . . . I am providing this Report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution. I appreciate the support of the Congress in this action." Id.

On April 7, 1999, the President again sent letters to Speaker Hastert and Senator Thurmond reporting on the situation in Kosovo as part of his "efforts to keep the Congress fully informed, consistent with the War Powers Resolution." See Pls' Motion for Summ.J., Exh. 38. The letter states that "[w]e will continue to intensify our actions to achieve the objectives I set forth in my report to the Congress of March 26 and to support the international relief efforts being conducted in the region." The letter reemphasizes that it is "not possible to predict how long [the] operations will continue." Id.

On April 28, 1999, the House of Representatives voted on four measures relevant to this action. By a vote of 2 to 427, the House defeated a joint resolution declaring a state of war between the United States and the government of the Federal Republic of Yugoslavia. See H.R.J.Res. 44, 106th Cong. (1999). By a tie vote, 213 to 213, the House rejected the concurrent resolution that had been passed by the Senate on March 23, 1999, authorizing the President to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia. See S.Con.Res. 21, 106th Cong. (1999). The House also defeated by a vote of 139 to 290 a

concurrent resolution that would have directed the President, "pursuant to section 5(c) of the War Powers Resolution, [50 U.S.C. § 1544(c),] to remove United States Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia." See H.R.Con.Res. 82, 106th Cong. (1999). Finally, the House passed a bill that prohibits the use of Department of Defense funds for deployment of United States ground forces to the Federal Republic of Yugoslavia without specific congressional authorization. See H.R. 1569, 106th Cong. (1999).[2]

On May 20, 1999, Congress passed an Emergency Supplemental Appropriations Act that, inter alia, provides supplemental emergency appropriations for the conflict in Yugoslavia. The appropriations bill requires the President to transmit to the Congress "a report, in both classified and unclassified form, on current United States participation in Operation Allied Force," defined as "operations of the North Atlantic Treaty Organization (NATO) conducted against the Federal Republic of Yugoslavia (Serbia and Montenegro) during the period beginning on March 24, 1999, and ending on such date as NATO may designate, to resolve the conflict with respect to Kosovo." See 1999 Emergency Supplemental Appropriations Act, Pub.L. No. 106-31, 113 Stat. 57. The Appropriations Act does not contain a statement that it is intended to constitute specific statutory authorization within the meaning of the War Powers Resolution.

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2. The Senate has taken no action on that bill.

Appendix B

C. Background of This Lawsuit

Plaintiffs are twenty-six members of the House of Representatives who voted nay on the Senate's concurrent resolution that would have authorized the President to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia.[3] Plaintiffs have sued President William Jefferson Clinton, contending that he has violated the War Powers Clause of the Constitution by beginning the air strikes prior to a congressional declaration of war and by continuing the air strikes without any congressional declaration of war or authorization under the Constitution.

Plaintiffs also claim that the President has violated the War Powers Resolution. They maintain that on March 26, 1999, two days after the air strikes began, the President was required to submit a written report pursuant to Section 1543(a) of the War Powers Resolution to the Speaker of the House of Representatives and to the President pro tempore of the Senate.[4] Regardless of whether such report was submitted, plaintiffs contend that pursuant to Section 1544, the President was required to withdraw the United States Armed Forces from the Federal Republic of Yugoslavia by

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3. On June 7, 1999, plaintiffs filed an Amendment to the Complaint to add five additional plaintiffs. The addition of these plaintiffs does not change the Court's analysis.

4. The Court does not understand whether or why plaintiffs believe the President did not comply with Section 1543(a) by virtue of the letters he sent to Speaker Hastert and Senator Thurmond on March 26, 1999. See supra at 37-38.

May 25, 1999, sixty days after the date he either did submit or was obligated to submit the written report required by the War Powers Resolution. Plaintiffs allege that the President was compelled to withdraw troops because Congress has not declared war on the Federal Republic of Yugoslavia, has not specifically authorized the use of forces, and has not specifically extended the sixty day period. Rather, the measure declaring war on the Federal Republic of Yugoslavia was overwhelmingly defeated in the House of Representatives, and the concurrent resolution that would have authorized the President to conduct military air operations and missile strikes in cooperation with NATO allies against Yugoslavia was very narrowly defeated in the House of Representatives. The appropriations bill lacked any specific authorization pursuant to the War Powers Resolution for the President to continue the air strikes, and Congress has not considered any extensions of time pursuant to the War Powers Resolution.

Plaintiffs therefore argue that either the President must immediately withdraw the troops from the Federal Republic of Yugoslavia or, if he determines and certifies in writing to the Congress that the continued use of forces for additional time is necessary solely in order to safely remove United States Armed Forces, he must withdraw the troops within thirty days. Plaintiffs seek a declaration to that effect from this Court.

The President has filed a motion to dismiss arguing that plaintiffs lack standing, that this case presents a non-justiciable political question, and that the issues presented are not ripe for resolution by the Court at this time.

Plaintiffs have filed a motion for summary judgment. The Court has held in abeyance further briefing on plaintiffs' motion pending a determination on the motion to dismiss filed by the President. See Order of May 26, 1999. The Court heard argument on the President's motion to dismiss on June 3, 1999.

II. DISCUSSION

Plaintiffs, who are members of the legislative branch, seek a declaration from the judicial branch that the President, the head of the executive branch, has violated the War Powers Clause of the Constitution and the War Powers Resolution by conducting air strikes in the Federal Republic of Yugoslavia without congressional authorization. Any case involving coordinate and co-equal branches of government raises separation of powers concerns, see, e.g., Moore v. United States House of Representatives, 733 F.2d 946, 955-56 (D.C.Cir.1984), cert. denied, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 775 (1985); Riegle v. Fed'l Open Market Comm., 656 F.2d 873, 879 (D.C.Cir.1981), cert. denied, 454 U.S. 1082, 102 S.Ct. 636, 70 L.Ed.2d 616 (1981), and War Powers actions brought by legislators raise especially grave separation of powers issues. See Dellums v. Bush, 752 F.Supp. 1141, 1149 (D.D.C.1990) ("The principle that the courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs").

For this reason, judges traditionally have expressed great reluctance to intercede in disputes between the political

branches of government that involve matters of war and peace. Some judges have found a jurisdictional bar: legislators lack standing to sue in such cases. See, eg., Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C.Cir.1983) (Bork, J., concurring), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984); Holtzman v. Schlesinger, 484 F.2d 1307, 1309-10 (2d Cir.1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974); cf. Goldwater v. Carter, 617 F.2d 697, 709-15 (D.C.Cir.) (en banc) (Wright and Tamm, J.J., concurring in result), vacated and remanded with directions to dismiss, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979). Others, while finding standing, have concluded that the particular dispute is not yet ripe for adjudication. See Dellums v. Bush, 752 F.Supp. at 1151. Because the law that developed in this Circuit over the years did not impose a particularly high standard to demonstrate legislative standing, judges here have sometimes exercised so-called equitable or remedial discretion to decline to resolve such cases or have invoked the political question or non-justiciability doctrine to avoid the political thicket. See, eg., Mitchell v. Laird, 488 F.2d 611, 615-16 (D.C.Cir.1973) (political question); Lowry v. Reagan, 676 F.Supp. 333, 339-40 (D.D.C.1987) (political question and remedial discretion); Crockett v. Reagan, 558 F.Supp. 893, 898-99 (D.D.C.1982) (political question and equitable discretion), aff'd per curiam, 720 F.2d 1355 (D.C.Cir.1983), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984).

The legal landscape with respect to legislative standing was altered dramatically by the Supreme Court in its first Line Item Veto decision, Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). Virtually all of this

Circuit's prior jurisprudence on legislative standing now may be ignored, and the separation of powers considerations previously evaluated under the rubric of ripeness or equitable or remedial discretion now are subsumed in the standing analysis. For all intents and purposes, the strict legislative standing analysis suggested by Justice Scalia in Moore v. United States House of Representatives, 733 F.2d at 956-61 (Scalia, J., concurring), now more closely reflects the state of the law. See also Crockett v. Reagan, 720 F.2d at 1357 (Bork, J., concurring). The Court's analysis in this case therefore begins and ends with the question of standing.[5]

Article III of the Constitution limits the jurisdiction of the federal courts to deciding actual cases and controversies. "[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." Whitmore v. Arkansas, 495 U.S. 149, 155, 110

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5. In addition to standing and ripeness, the President also has argued that this case raises a non-justiciable political question. To the extent that the President is arguing that every case brought by a legislator alleging a violation of the War Powers Clause raises a non-justiciable political question, he is wrong. See Baker v. Carr, 369 U.S. 186, 210- 11, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. . . . [The Court instead must conduct] a discriminating analysis of the particular question posed" in order to determine whether the issue is justiciable); Mitchell v. Laird, 488 F.2d at 614 (in some instances there may be "judicial competence to determine the allocation, between the executive and legislative branches, of the powers to wage war"). Because the Court concludes that plaintiffs lack standing, however, it need not reach the issue of whether this case is one in which the judicial branch has competence to adjudicate such questions.

S.Ct. 1717, 109 L.Ed.2d 135 (1990), and it "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). At an irreducible minimum, in order to establish standing plaintiffs seeking to obtain relief must allege " 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " See Raines v. Byrd, 521 U.S. at 818, 117 S.Ct. 2312 (quoting Allen v. Wright, 468 U.S. at 751, 104 S.Ct. 3315).

The dispute over standing in this case centers on whether plaintiffs, suing in their capacities as members of the House of Representatives, have alleged a particularized and personal injury sufficient to establish their interest in this litigation.[6] The alleged injury must be "legally and judicially cognizable," which means, among other things, "that the plaintiff have suffered an invasion of a legally protected interest which is concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process." Raines v. Byrd, 521 U.S. at 819, 117 S.Ct. 2312 (internal quotations and citations omitted). "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. at 754, 104 S.Ct. 3315.

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6. It is clear that plaintiffs are suing in their official capacities as members of Congress and not in their individual capacities. Compare Amended Complaint at ¶ 4 with Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

Appendix B

Since the standing requirement is based on separation of powers principles, the standing inquiry is "especially rigorous" where, as here, "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." See Raines v. Byrd, 521 U.S. at 819-20, 117 S.Ct. 2312. Alleging a sufficiently concrete and particularized injury to establish institutional standing as a member of Congress is not an easy task. especially since "the only test of congressional standing that is both consistent with our constitutional traditions and susceptible of principled application . . . must take as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers." Moore v. United States House of Representatives, 733 F.2d at 959 (Scalia, J., concurring).

In Raines v. Byrd, the Supreme Court held that members of Congress who voted against the Line Item Veto Act, 2 U.S.C. § 691, et. seq., lacked standing to challenge the constitutionality of that Act. See Raines v. Byrd, 521 U.S. at 829-30, 117 S.Ct. 2312. Plaintiffs in Raines had alleged that they suffered injury in their institutional capacity because the Act diminished the effectiveness of their future votes on appropriations bills and altered the balance of power between Congress and the President. The Court concluded, however, that any such injury was "wholly abstract and widely dispersed" and that plaintiffs therefore had failed to allege a "sufficiently concrete injury to have established Article III standing." See id.

Appendix B

At oral argument, plaintiffs' counsel acknowledged that after Raines, a general allegation that the President has ignored the War Powers Clause or the War Powers Resolution is too generalized an injury to provide a legislator with standing. Citing Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), the one case in which the Supreme Court has upheld standing for legislators claiming an institutional injury, plaintiffs instead argue that where Congress has affirmatively exercised its authority and the President "nullifies" or ignores a clear direction from Congress, legislators do have standing to challenge the President's actions.

In Coleman, members of the Kansas State Senate established standing in their institutional capacities to seek redress for an alleged nullification of a vote they had taken. Twenty members of the forty-member Kansas State Senate voted against an amendment to the United States Constitution. Lacking a majority vote, the amendment would not have been ratified except that the Lieutenant Governor, the President of the State Senate, cast the deciding vote for the amendment. Plaintiffs, including all twenty senators who had voted against the amendment, alleged that the Lieutenant Governor had no authority to cast the deciding vote and sued for a writ of mandamus in the Kansas Supreme Court to prevent the governor from certifying that the amendment had been ratified. The Kansas Supreme Court found that plaintiffs had standing but ruled against them on the merits. On certiorari, the Supreme Court held that the members of the legislature had standing because the votes of the plaintiffs "against ratification have been overridden and virtually held for naught although if they are right in their contentions their

votes would have been sufficient to defeat ratification." See Coleman v. Miller, 307 U.S. at 438, 59 S.Ct. 972.

While the Coleman decision was not overturned by Raines, it has been limited and now stands at most "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the grounds that their votes have been completely nullified." See Raines v. Byrd, 521 U.S. at 823, 117 S.Ct. 2312.[7] It was unnecessary for the Court in Raines to examine the precise parameters of the Coleman exception, however, because of the "vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power" that was alleged by the members of Congress challenging the Line Item Veto Act. See Raines v. Byrd, 521 U.S. at 824, 117 S.Ct. 2312.

The circumstances of this case obviously are more similar to those of Coleman than were the circumstances in Raines. Plaintiffs here allege that the President's actions have deprived them of "their constitutional right and duty under Article I, Section 8, Clause 11, to commit this country to

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7. It is important to note that Coleman did not implicate separation of powers concerns to the extent that they are implicated in this case because the plaintiffs there were state legislators challenging the acts of a state executive. See Raines v. Byrd, 521 U.S. at 824 n. 8, 832 n. 3, 117 S.Ct. 2312 (Souter, J., concurring). It is possible that the Coleman exception is further narrowed where, as here, plaintiffs are members of the federal legislature who are challenging the actions of the federal executive.

war, or to prevent, by refusing their assent, the committing of this country to war," and that the President has "completely nullifie[d] their vote against authorizing military air operation and missile strikes against Yugoslavia." Amended Complaint at ¶ 18. They have alleged that they voted against the concurrent resolution authorizing the President to conduct air strikes in the Federal Republic of Yugoslavia, that they had sufficient votes to defeat that resolution and that the resolution in fact failed. See id. at ¶¶ 15, 17. They also have alleged that they had sufficient votes to defeat a measure declaring a state of war against the Federal Republic of Yugoslavia. Id. at ¶¶ 16, 17. Despite the fact that both of those measures were defeated, plaintiffs allege that the President of the United States has ignored the votes and has acted as though Congress either has declared war or has specifically authorized his actions in the Federal Republic of Yugoslavia.

While there are facial similarities between the facts of Coleman and the situation presented in this case, upon closer scrutiny of plaintiffs' allegations, the Court concludes that plaintiffs lack standing under the Coleman exception to Raines. In the circumstances presented, the injury of which plaintiffs complain — the alleged "nullification" of congressional votes defeating the measures declaring war and providing the President with authorization to conduct air strikes — is not sufficiently concrete and particularized to establish standing. To have standing, legislative plaintiffs must allege that their votes have been "completely nullified," Raines v. Byrd, 521 U.S. at 823, 117 S.Ct. 2312, or "virtually held for naught." Coleman v. Miller, 307 U.S. at 438, 59 S.Ct. 972. Such a showing requires them to demonstrate that

there is a true "constitutional impasse" or "actual confrontation" between the legislative and executive branches; otherwise courts would "encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." Goldwater v. Carter, 444 U.S. at 997- 98, 100 S.Ct. 533 (Powell, J., concurring). In the Court's view, there is no such constitutional impasse here.[8]

If Congress had directed the President to remove forces from their positions and he had refused to do so or if Congress had refused to appropriate or authorize the use of funds for the air strikes in Yugoslavia and the President had decided to spend that money (or money earmarked for other purposes)

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8. A finding that the legislative plaintiffs in this case lack standing under these circumstances does not preclude judicial resolution of a challenge to the President's actions. Counsel for the President appears to have acknowledged that an individual alleging personal injury from the President's alleged failure to comply with the War Powers Clause or the War Powers Resolution, as for instance a serviceperson who has been sent to carry our the air strikes against the Federal Republic of Yugoslavia, would have standing to raise these claims. See Def's Reply at 8. Compare Raines v. Byrd, 521 U.S. at 830, 117 S.Ct. 2312 (members of Congress alleging institutional injury have no standing to challenge constitutionality of Line Item Veto Act) with Clinton v. New York, 524 U.S. 417, 118 S.Ct. 2091, 2099, 141 L.Ed.2d 393 (1998) (individuals alleging personal injury from President's exercise of power granted by Line Item Veto Act do have standing to challenge constitutionality of Act). The Court also notes that the political question doctrine does not apply to suits brought by individuals in their personal capacities. See Michel v. Anderson, 14 F.3d 623, 628 (D.C.Cir.1994).

anyway, that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs. Cf. Goldwater v. Carter, 444 U.S. at 999-1000, 100 S.Ct. 533 (Powell, J., concurring) (in hypothetical situation where President announces that treaty would go into effect despite its rejection by Senate, judicial branch could resolve dispute). The two votes at issue in this case, however, do not provide the President with such an unambiguous directive; neither vote facially required the President to do anything or prohibited him from doing anything. Unlike in Coleman where the meaning of the vote allegedly nullified was clearly that the legislature did not want the amendment ratified, the meaning of the two votes at issue in this case is not self-evident. The fact that some members of Congress believe that the President's actions are inconsistent with two particular congressional votes does not a fortiori demonstrate an impasse that would provide those members of Congress with standing.

Congressional reaction to the air strikes has sent distinctly mixed messages, and that congressional equivocation undermines plaintiffs' argument that there is a direct conflict between the branches. On the same day that the House of Representatives defeated the measures declaring war against the Federal Republic of Yugoslavia and providing the President with authorization to conduct air strikes, it also defeated a resolution that would have directed the President, "pursuant to section 5(c) of the War Powers Resolution, to remove United States Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia." H.R.Con.Res. 82, 106th Cong. (1999). Congress subsequently passed a Supplemental

Emergency Appropriations Act that provides funding for the activities being undertaken in the Federal Republic of Yugoslavia. See 1999 Emergency Supplemental Appropriations Act, Pub.L. No. 106-31, 113 Stat. 57.[9] Had the four votes been consistent and against the President's position, and had he nevertheless persisted with air strikes in the face of such votes, there may well have been a constitutional impasse. But Congress has not sent such a clear, consistent message. Where, as here, Congress has taken actions that send conflicting signals with respect to the effect and significance of the allegedly nullified votes, there is no actual confrontation or impasse between the executive and legislative branches and thus no legislative standing. Cf. Goldwater v. Carter, 444 U.S. at 997-98, 100 S.Ct. 533 (Powell, J., concurring); Lowry v. Reagan, 676 F.Supp. at 340- 41; Moore v. United States House of Representatives, 733 F.2d at 954-56; Holtzman v. Schlesinger, 484 F.2d at 1315.[10]

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9. While neither the defeat of the House concurrent resolution nor the passage of the Appropriations Act constitutes an "authorization" within the meaning of the War Powers Resolution, see 50 U.S.C. § 1547, congressional action on those measures is relevant to the legislative standing analysis.

10. Because plaintiffs' alleged injury is caused in part by their failure to persuade their colleagues in the Congress to defeat the budget authorization bill and to vote for the resolution directing the President to withdraw troops from Yugoslavia, it also is not clear that plaintiffs can establish that their alleged injury is "fairly traceable" to the actions of the President rather than to the actions of their colleagues in the Congress. See Raines v. Byrd, 521 U.S. at 830 n. 11, 117 S.Ct. 2312.

Finally, it is significant that some of the 213 representatives who voted against authorizing the President's actions and against a declaration of war also voted in favor of supporting the troops and appropriating money to fund the conflict in Yugoslavia and against directing the President to remove the Armed Forces from their positions. The position of the twenty-six plaintiffs — that the President has nullified congressional votes by continuing air strikes — therefore appears not to be shared by a number of their colleagues the nullification of whose votes they seek to vindicate. While the Court is not suggesting that all 213 representatives who voted to defeat the authorization resolution must join in this lawsuit in order to establish legislative standing, the absence of any indication that the twenty-six plaintiffs have been authorized to represent those two-hundred and thirteen representatives — or even a substantial number of them — compels the conclusion that plaintiffs have no standing to raise these claims. See Raines v. Byrd, 521 U.S. at 829, 117 S.Ct. 2312 ("We attach some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action . . ."); Bender v. Williamsport Area School District, 475 U.S. 534, 544, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (status as school board member did not confer upon plaintiff right to appeal on behalf of board as a whole where board itself declined to take such appeal); Dellums v. Bush, 752 F.Supp. at 1151 ("it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it").[11]

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11. The President has suggested that if Congress has available to it other remedies to check a President's alleged abuse of power

(Cont'd)

For all of these reasons, plaintiffs have failed to establish a sufficiently genuine impasse between the legislative and executive branches to give them standing. The most that can be said is that Congress is divided about its position on the President's actions in the Federal Republic of Yugoslavia and that the President has continued with air strikes in the face of that divide. Absent a clear impasse between the executive and legislative branches, resort to the judicial branch is inappropriate. See Goldwater v. Carter, 444 U.S. at 997, 100 S.Ct. 533 (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse"); Dellums v. Bush, 752 F.Supp. at 1149 ("Judicial restraint must, of course, be even further enhanced where the issue is one — as here — on which the other two branches [themselves] may be deeply

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(Cont'd)

such as impeaching him or withholding funds, a judicial remedy is precluded. That is incorrect. The mere availability of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President.

While the availability of such a remedy does not affect the standing analysis, the fact that Congress actually took contradictory steps certainly is relevant to a determination of standing under Raines and Coleman. If neither the budget authorization bill nor the measure directing the President to withdraw troops from Yugoslavia had been introduced or considered, the fact that Congress could have introduced such bills may not have been sufficient to defeat standing. But the House of Representatives did in fact consider and vote on both measures, and the congressional action on those two measures therefore cannot be ignored.

divided"). Cf. Humphrey v. Baker, 848 F.2d 211, 214 (D.C.Cir.1988) ("the availability of an internally available remedy to Members of Congress means that it would be an abuse of discretion for the judiciary to entertain the action"), cert. denied sub nom. Humphrey v. Brady, 488 U.S. 966, 109 S.Ct. 491, 102 L.Ed.2d 528 (1988). Because plaintiffs have failed to demonstrate an actual confrontation or constitutional impasse between the legislative and executive branches, they have no standing to bring this action.

This is not to say that members of the legislative branch never have standing to resort to the judicial branch when the executive branch flouts the law. But the courts will apply Raines and Coleman rigorously and will find standing only in the clearest cases of vote nullification and genuine impasse between the political branches. Under the circumstances presented in this case, the Court cannot conclude that plaintiffs have standing to bring this action, and the case therefore will be dismissed. An Order and Judgment consistent with this Opinion will be issued this same day.

SO ORDERED.

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, § 8, Cl. 11

SECTION 8. The Congress shall have Power . . .

* * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

* * *

THE WAR POWERS RESOLUTION

50 U.S.C. § 1541

§ 1541. Purpose and policy

(a) Congressional declaration. It is the purpose of this joint resolution [50 USCS §§ 1541 et seq.] to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause. Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

Appendix C

(c) Presidential executive power as Commander-in-Chief; limitation. The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

* * *

50 U.S.C. § 1542

§ 1542. Consultation; initial and regular consultations

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

* * *

50 U.S.C. § 1543

§ 1543. Reporting requirement

(a) Written report; time of submission; circumstances necessitating submission; information reported. In the

absence of a declaration of war, in any case in which United States Armed Forçes are introduced —

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —

> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

(b) Other information reported. The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with

respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Periodic reports; semiannual requirement. Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

* * *

50 U.S.C. § 1544

§ 1544. Congressional action

(a) Transmittal of report and referral to Congressional committees; joint request for convening Congress. Each report submitted pursuant to section 4(a)(1) [50 USCS § 1543(a)(1)] shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if

petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Termination of use of United States Armed Forces; exceptions; extension period. Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1) [50 USCS § 1543(a)(1)], whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Concurrent resolution for removal by President of United States Armed Forces. Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

* * *

Appendix C

50 U.S.C. § 1545

§ 1545. Congressional priority procedures for joint resolution or bill

(a) Time requirement; referral to Congressional committee; single report. Any joint resolution or bill introduced pursuant to section 5(b) [50 USCS § 1544(b)] at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote. Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee. Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period

specified in section 5(b) [50 USCS § 1544(b)]. The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses. In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b) [50 USCS § 1544(b)]. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

* * *

50 U.S.C. § 1546

§ 1546. Congressional priority procedures for concurrent resolution

(a) Referral to Congressional committee; single report. Any concurrent resolution introduced pursuant to section 5(c) [50 USCS § 1544(c)] shall be referred to the Committee on Foreign Affairs of the House of

Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote. Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee. Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses. In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the

printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

* * *

15 U.S.C. § 1546a

§ 1546a. Expedited procedures for certain joint resolutions and bills

Any joint resolution or bill introduced in either House which requires the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization shall be considered in accordance with the procedures of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976 [unclassified], except that any such resolution or bill shall be amendable. If such a joint resolution or bill should be vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to twenty hours in the Senate and in the House shall be determined in accordance with the Rules of the House.

* * *

Appendix C

50 U.S.C. § 1547

§ 1547. Interpretation of joint resolution

(a) Inferences from any law or treaty. Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —

> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution [enacted Nov. 7, 1973]), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or
>
> (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Joint headquarters operations of high-level military commands. Nothing in this joint resolution [50 USCS §§ 1541 et seq.] shall be construed to require any further specific statutory authorization to permit members of United

States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution [enacted Nov. 7, 1973] and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) Introduction of United States Armed Forces. For purposes of this joint resolution [50 USCS §§ 1541 et seq.], the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Constitutional authorities or existing treaties unaffected; construction against grant of Presidential authority respecting use of United States Armed Forces. Nothing in this joint resolution [50 USCS §§ 1541 et seq.] —

> (1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or
>
> (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities

is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

* * *

50 U.S.C. § 1548

§ 1548. Separability of provisions

If any provision of this joint resolution [50 USCS §§ 1541 et seq.] or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

* * * *